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In The
Supreme Court of the United States

WILLIAM H. SCHRAMM,

Petitioner,

v.

RAY LAHOOD,
Secretary, Department of Transportation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure provides that a notice of appeal must "designate the judgment, order, or part thereof being appealed." The first Question Presented is:

> What standard governs the determination as to whether a judgment or order has been adequately designated under Rule 3(c)(1)(B)?

(2) In *Robinson v. Shell Oil Corp.* this Court held that the anti-retaliation provision of Title VII of the 1964 Civil Rights Act protects former employees. The second Question Presented is:

> Is the standard governing when an employer is vicariously liable for unlawful retaliation under Title VII different when the victim is a former employee rather than a current employee?

PARTIES

The parties to this case are set out in the caption.

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Petitioner William H. Schramm respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on March 19, 2009.

OPINIONS BELOW

The March 19, 2009, opinion of the court of appeals, which is reported at 318 Fed. Appx. 337 (6th Cir. 2009), is set out at pp. 1a-23a of the Appendix. The March 25, 2008 order of the district court, which is unofficially reported at 2008 WL 820463 (N.D.Ohio), is set out at pp. 33a-42a of the Appendix. The February 11, 2008 order of the district court, which is unofficially reported at 2008 WL 397592 (N.D.Ohio), is set out at pp. 24a-32a of the Appendix. The July 14, 2009 order of the court of appeals, denying rehearing and rehearing en banc, which is not officially reported, is set out at pp. 43a-44a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 19, 2009. A timely petition for rehearing and rehearing en banc was denied on July 14, 2009. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE AND STATUTORY PROVISION INVOLVED

The rule and statutory provision involved are set out in the appendix to this document.

STATEMENT

For almost two decades prior to 1999 William Schramm worked as an air traffic controller for the Federal Aviation Administration. After his retirement in 1999 Schramm filed suit under Title VII of the 1964 Civil Rights Act, alleging inter alia that he had been the victim of gender-based discrimination while employed at the FAA. That original discrimination suit has since been resolved. That litigation, however, led to a number of alleged incidents of retaliation, resulting in two subsequent actions asserting that Schramm was the victim of unlawful reprisals, in violation of section 704(a) of Title VII. Although the two retaliation actions turned on different issues, the appeals in those cases were consolidated in the court of appeals and resolved in a single opinion.

(1) The Retaliatory Assault

In 2002 Schramm assisted a process server in serving subpoenas upon witnesses in the sex discrimination suit then pending trial. The process server enlisted Schramm to identify individuals to be served as they left the tower at the Toledo Airport. One of Schramm's former supervisors became

enraged when he was served. Shortly thereafter the supervisor driving a pick-up truck pulled alongside of Schramm and began verbally abusing him. The supervisor made statements to the effect that "they were not through with him" and "they would take care of him at trial." (App. 26a).

Schramm attempted to walk away from the moving truck. That provoked the supervisor to shift the truck into reverse, drive at Schramm at a high rate of speed, and swing around at the last possible second to avoid hitting the plaintiff. The supervisor continued to follow Schramm and verbally abuse him as Schramm walked to the airport Police Station to file a complaint. (App. 24a-26a).

After filing a charge with the EEOC, Schramm filed suit alleging that the supervisor had assaulted him in this manner in reprisal for Schramm's actions in filing suit under Title VII and in causing the supervisor to be subpoenaed as a witness. (App. 26a). The district court dismissed this complaint, holding that the anti-retaliation provision in section 704(a) of Title VII did not protect Schramm from a retaliatory assault because Schramm, in assisting the process server, had violated Rule 45(b)(1) of the Federal Rules of Civil Procedure. (App. 30a-31a).

The Sixth Circuit affirmed on other grounds. The court of appeals concluded that the government "cannot be held vicariously liable under Title VII for [the supervisor's] conduct." (App. 21a). An employer is ordinarily liable for retaliatory acts taken by

supervisor or management officials against current employees. The usual liability rules, the Sixth Circuit held, do not apply to former employees.

> Schramm had not been employed by the FAA for several years when the subpoena incident occurred, and the analyses that courts typically undertake to determine vicarious liability for a violation of Title VII's anti-retaliation provision simply do not apply to these facts.

(App. 21a).

The court of appeals held that an employer is not liable for retaliatory actions against a former employee where the victim had not been employed for "several years" and the retaliation occurred "outside of the workplace." (App. 21a and n.2).

(2) The Retaliatory Disqualification

In February 2003, following his retirement from the FAA, Schramm was hired to work as an air traffic controller for a private firm that contracted with the FAA to handle air traffic at a smaller airport in Michigan. In August 2003, Schramm was hired by the Department of Defense to work as a contract controller as part of Operation Enduring Freedom in Afghanistan. Schramm was deployed to Uzbekistan, and volunteered for duty in Kabul, Afghanistan. (App. 34a). As a condition of working as an air traffic controller for these employers, Schramm was required to obtain a medical certification from the Flight

Surgeon's Office of the FAA. Schramm was issued that certification in February 2003 and again in August 2003.

On November 7, 2003, Schramm commenced the civil action against the FAA for the retaliatory assault. On or about December 1, 2003, a copy of the summons and complaint were served on the Department of Transportation. Less than a month later, on December 30, 2003, without any prior notice or explanation, the FAA sent Schramm a letter rescinding his medical certification. As a result of the disqualification, Schramm's employment in Uzbekistan was terminated, and he was forced to return to the United States. The FAA did not reissue a medical certificate to Schramm until January 2005, and he was unable to resume employment as an air traffic controller until May of that year.

Schramm alleged that the medical disqualification issued in December 2003 was in retaliation for the lawsuit he had filed against the FAA regarding the retaliatory assault. After first filing an administrative complaint with the EEOC, Schramm filed a second retaliation lawsuit, in this action asserting that the medical disqualification was a reprisal for his earlier retaliation lawsuit, in violation of section 704(a) of Title VII.

Shortly after it was commenced, the retaliatory disqualification case was reassigned to the district judge already responsible for the retaliatory assault case. The two cases were subsequently consolidated,

although the cases retained different docket sheets and docket numbers and continued to be litigated separately. That assignment and consolidation, however, set in motion the events which ultimately led the court of appeals to dismiss Schramm's appeal in the retaliatory disqualification case.

After a period of discovery the defendant filed a motion for summary judgment in the retaliatory disqualification case. On February 11, 2008, while that motion was still pending in the retaliatory disqualification case, the judge to whom both cases had been assigned granted summary judgment in the separate retaliatory assault case. For reasons that remain unexplained, the Clerk's office filed the February 11 order not only in the retaliatory assault case (which that order resolved), but also in the retaliatory disqualification case (which that order did not mention).

Approximately six weeks later, on March 25, 2008, the same district judge granted summary judgment in the retaliatory disqualification case. The district court concluded that Schramm could not show that the disqualification was issued for a retaliatory purpose because there was insufficient evidence that the FAA officials involved in the decision to cancel Schramm's medical qualification were aware of the protected activity, the filing of the earlier retaliation case. (App. 37a-42a).

On the front page of the Civil Docket for the retaliatory disqualification case, the Clerk's Office

subsequently wrote "Date Terminated: 02/11/2008."[1] February 11, 2008, was actually the date on which the retaliatory assault case had been terminated, not the date on which the retaliatory disqualification case ended.

On April 1, 2008, Schramm filed two notices of appeal, one in each case, and paid separate filing fees in each case. The notice of appeal in the retaliatory disqualification case stated that Schramm was appealing "from the Summary Judgment and Termination entered in this action on the 11th day of February, 2008."[2] A month later, on April 21, 2008, pursuant to Sixth Circuit practice, Schramm filed in the court of appeals regarding the appeal in the retaliatory disqualification case a "Statement of Parties and Issues." The "proposed issues" set out in that Statement clearly referred to the substance of the March 25 summary judgment decision in the retaliatory disqualification case.[3] That Statement in the

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[1] See: http://ecf.ohnd.uscourts.gov/cgi-bin/DktRpt.pl?480295896743097-L

[2] R. 52 Notice, J.A. 56.

[3] For example, the first proposed issue concerned the portion of the March 25 order in which the district judge had concluded there was insufficient evidence that the officials who approved the disputed December 2003 disqualification were aware of the lawsuit that Schramm had filed the month before:

> I. Whether knowledge of Title VII activity may be established through the statements of the plaintiff as well as the contradictions in sworn testimony among the defense witnesses when that evidence shows that a secretary working [in] the medical department of

(Continued on following page)

appeal of the retaliatory disqualification case, however, also recited that Schramm was appealing from "an order rendering summary judgment in ... favor [of the defendant] on February 11, 2008."

In his brief in the Sixth Circuit Schramm interpreted the opinions and docket sheet to mean that the district court's February 11, 2008 order had granted summary judgment in both cases, and that the March 25, 2008 order had set out an additional reason for the award of summary judgment in the retaliatory disqualification case.[4] The government's appellate brief did not dispute this characterization of the events in the district court; that brief was silent as to whether summary judgment in the retaliatory disqualification case had been granted on February 11, 2008, on March 25, 2008, or both. The government's brief did state with regard to the two district court cases that

> The district court granted summary judgment in favor of the Appellee ... in both cases.... Final judgments that disposed of all

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> the defendant accessed the medical records of the plaintiff at the request of an unauthorized person from a department which knew of the plaintiff's Title VII activity, and who, together with that secretary, used the information to retaliate against the plaintiff shortly after the service of his Title VII Compliant upon the defendant.

Statement of Parties and Issues, filed April 21, 2008.

[4] Brief of Appellant, Nos. 08-3420 and 08-3421 (6th Cir.), at 24-25.

> parties' claims were entered by the district court on March 25, 2008.[5]

In fact there was only a single final judgment entered on March 25, and that was in the retaliatory disqualification case. The government's brief on appeal noted with regard to the retaliatory disqualification case that "the [district] court granted the FAA's Motion for Summary Judgment. Schramm filed a Notice of Appeal from the district court's decision on April 1, 2008."[6] That statement reflected the defendant's understanding that Schramm's notice of appeal concerned the award of summary judgment in the disqualification case.

At the oral argument the court of appeals, sua sponte, raised a question as to whether it lacked jurisdiction to hear the appeal of the retaliatory certification case because Schramm's notice of appeal in that case referred only to the February 11, 2008 opinion and order. The Sixth Circuit directed the parties to file supplemental briefs on that issue.

In response the government now asserted that the February 11, 2008 order, although entered in the retaliatory disqualification case, had no application to that case. The United States made clear that it understood that Schramm intended to appeal the award of summary judgment in that case, and

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[5] Brief of Appellee, Nos. 08-3420 and 08-3421 (6th Cir.) at 1.

[6] *Id.* at 6.

asserted that he had mistakenly identified the wrong district court order.

> [T]he Notice of Appeal in the Medical Certification Case incorrectly referred to the Opinion and Order of February 11, 2008.... The district court did not issue an Opinion and Order in the Medical Certification Case until March 25, 2008.... The only document filed by the district court in the Medical Certification Case on February 11, 2008, was the Opinion and Order in the Assault Case.[7]

The United States "concede[d] that [it] was not harmed by Schramm's failure to designate the correct judgment entry."[8] The government nonetheless contended that Schramm's notice of appeal was insufficient to create jurisdiction over any appeal regarding the March 25, 2008 order. The United States noted that Sixth Circuit precedent mandated "a strict application of Rule 3(c)(1)(B)," rather than the "functional notice" approach in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The government urged the court of appeals to adhere to its more stringent standard.[9] The United States asked the

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[7] Supplemental Brief of Appellee, No. 08-3420, at 3.

[8] *Id.* at 11-12.

[9] *Id.* at 11:

> Following *Torres*, the Notice of Appeal would ... be valid if it gave functional notice of the judgment being appealed.... On the other hand, a strict application of Rule 3(c)(1)(B), as illustrated in *[United States v.] Glover* [, 242 F.3d 333 (6th Cir. 2001)] and *Isert [v.*

(Continued on following page)

Sixth Circuit to hold that in determining the sufficiency of a notice of appeal, the court should consider only the content of the notice of appeal itself. The appellate courts, it urged, should not "review ... surrounding circumstances to determine [an appellant's] intent."[10]

The court of appeals applied the standard proposed by the government, relying on the Sixth Circuit precedents cited in the government's brief. In determining under Rule 3(c)(1)(B) what order is the subject of an appeal, the Sixth Circuit held, the appellate court can consider only the content of the notice of appeal itself, and must disregard any other circumstances.

> Our precedents do not allow us to examine the circumstances surrounding an appeal in an effort to determine whether an appellant has made a mistake in designating the order he wishes to appeal. They instead require that we ... look to the notice of appeal to

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Ford Motor Co., 462 F.3d 756 (6th Cir. 2006)], would mandate dismissal of Schramm's appeal.

[10] *Id.* at 12. Among the surrounding circumstances which the court of appeals should not consider, the government suggested, was the fact that

> there was only one judgment entry entered in the case, reducing the chance that the court or opposing party would be confused as to the judgment or issues appealed.

Id. at 11.

> ascertain the judgments and orders the notice encompasses.

(App. 15a). Thus although the Sixth Circuit, and the government, both understood that Schramm had actually intended to appeal the dismissal of his retaliatory disqualification claim, the court of appeals concluded that the notice of appeal filed in, and bearing the docket number of, the disqualification case, technically constituted an appeal of the dismissal of the retaliatory assault case.

> It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs and that the Secretary was not prejudiced by his mistake in identifying the wrong order. What matters is that Schramm's intent to appeal the March 25, 2008 order is not discernable from *the notice of appeal itself*. To the contrary, it appears from the notice that Schramm intended to appeal only the order that granted summary judgment in the retaliatory assault case but which was entered into the record in both that case and the medical disqualification case.

(App. 15a-16a) (emphasis added).

Plaintiff filed a timely petition for rehearing and rehearing en banc regarding the panel disposition of both appeals. That petition was denied on July 14, 2009. (App. 43a-44a).

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING THE ORDER-DESIGNATION PROVISION OF RULE 3(c)(1)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

A. The Decision of The Sixth Circuit Is In Conflict With Decisions In Ten Circuits

Rules 3 and 4 of the Federal Rules of Appellate Procedure play a pivotal role in determining what appeals may be heard by the circuit courts. Because of the central importance of those provisions in the administration of justice in the appellate courts, this Court has repeatedly granted certiorari to resolve disagreements among the lower courts regarding the proper interpretation of Rules 3 and 4.[11] This case concerns a sharp inter-circuit conflict regarding the

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[11] *United States, ex rel. Eisenstein v. City of New York*, 129 S.Ct. 2230 (2009) (interpreting Rule 4(a)(1)); *Bowles v. Russell*, 551 U.S. 205 (2007) (interpreting Rule 4(a)(1)(A)); *Becker v. Montgomery*, 532 U.S. 757 (2001) (evaluating the "complementary operation" of Rule 4(a)(1) and Rule 11 of the Federal Rules of Civil Procedure); *Smith v. Barry*, 502 U.S. 244 (1992) (applying Rule 3 to determination of whether an informal brief may constitute a notice of appeal); *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991) (construing Rule 4(a)); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (construing Rule 3(c)(1)(A)); *Foman v. Davis*, 371 U.S. 178 (1962) (reversing decision that notice of appeal was defective because it assertedly "failed to specify that the appeal was being taken from" a particular judgment).

construction of Rule 3(c)(1)(B), which requires that a notice of appeal "designate the judgment, order, or part thereof being appealed."

The Sixth Circuit applies a uniquely stringent interpretation of Rule 3(c)(1)(B). In determining what order or judgment is being appealed, the Sixth Circuit holds, an appellate court may consider only "the notice of appeal itself," and must disregard any of "the circumstances surrounding an appeal." (App. 15a, 16a). Applying that rigid rule, the court of appeals has concluded that the notice of appeal in the retaliatory disqualification case was actually an appeal of an order in an entirely different case; as so construed the notice of appeal was both manifestly pointless (because the same party had filed a separate appeal in that other case) and entirely ineffective (because it was not filed in the case to which the circuit court held it pertained).

The decision in the instant case applies well-established Sixth Circuit case law embodied in a series of officially reported decisions in that circuit. The panel refused to construe the notice of appeal in light of facts extrinsic to the notice itself because "[o]ur precedents do not allow us to examine the circumstances surrounding an appeal in an effort" to construe a notice of appeal. (App. 15a). The outcome of the dispute regarding the application of Rule 3(a)(1)(B) in this case, the court below explained, was governed by "our prior decisions." (*Id.*; see *id.* ("case law of this circuit")).

The Sixth Circuit rule forbidding consideration of matters outside the notice of appeal was firmly established by that circuit's decision in *United States v. Glover*, 242 F.3d 333 (6th Cir. 2001).[12] *Glover* concluded that the courts should not look at factors outside the notice of appeal because there could be "a morass of objective and subjective factors," and it would be unduly difficult to "divine the [appellant's] intended appellate targets." 242 F.3d at 337.[13] The

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[12] Although the Sixth Circuit had earlier "loosen[ed]" the requirement in F.R.App.P. 3(c)(1)(A) regarding the requirement that a notice of appeal designate the court appealed to, it insisted on a more stringent interpretation of Rule 3(c)(1)(B).

> Unlike the decision *where* to appeal, the decision *what* to appeal is left almost exclusively to the discretion of the appellant. Furthermore, it generally is true that numerous potentially appealable issues have been generated by the district court before an appeal is taken. Whether any of those issues actually will be appealed depends upon a number of factors.... Thus, unlike the decision ... loosening ... the requirement "to name the court to which the appeal is taken" ... a similar loosening of the requirement "to designate the judgment, order or part thereof appealed" ... would, if approved, too frequently require this Court to sort through a morass of objective and subjective factors to meditate upon and divine the party's intended appellate targets.

242 F.3d at 336-37 (emphasis in original). The Sixth Circuit reaffirmed the rule in *Glover* in *Isert v. Ford Motor Co.*, 461 F.3d 756, 760 (6th Cir. 2006).

[13] The majority in *Glover* rejected the argument of the dissenting judge that the order appealed from could readily be identified by looking at the timing and procedural context of the notice of appeal. The notice had been filed shortly after a

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panel in the instant case expressly relied on *Glover*, as the United States had urged it to do. (App. 12a-13a). The Sixth Circuit has been particularly aggressive in invoking Rule 3(c)(1)(B) to dismiss appeals, repeatedly doing so when the appellee itself had not questioned the sufficiency of the notice of appeal.[14]

The court of appeals below candidly acknowledged that the Sixth Circuit standard is different than the standard in several other circuits.

> Schramm ... cites two cases from other circuits in support of his argument that a party should be permitted to pursue an appeal from a specific judgment when the intent to do so can fairly be inferred from the appellant's notice and subsequent filings and when the opposing party is not misled by the mistake. *See Messina v. Krakower*, 439 F.3d 755 (D.C.Cir. 2006); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No.*

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hearing at which the district judge ruled in favor of the defendant on a hotly disputed issue, and "the Assistant United States Attorney noted her objection to this ruling on the record. No other issue was argued at this conference." 242 F.3d at 338.

[14] In *Martin v. General Electric Co.*, 187 Fed. Appx. 553 (6th Cir. 2006), the Sixth Circuit dismissed part of an appeal on this basis even though "[t]he parties did not question our jurisdiction to entertain this appeal in their briefs." 187 Fed. Appx. at 557. In *United States v. Universal Management Services, Inc., Corp.*, 191 F.3d 750 (6th Cir. 1999), the court of appeals did the same, even though the United States, as the appellee, had apparently argued that the court had jurisdiction over the question briefed by the appellant. 191 F.3d at 755.

> *69*, 374 F.3d 857 (9th Cir. 2004). Insofar as these decisions allow the court to look beyond the notice of appeal to discern an appellant's intent and determine whether the functional requirements of Rule 3 are fulfilled, they are not consistent with the case law of this circuit.... Our precedents do not allow us to examine the circumstances surrounding an appeal in an effort to determine whether an appellant has made a mistake in designating the order he wishes to appeal.

(App. 14a-15a).

Ten circuits apply the very standard rejected by the Sixth Circuit, holding that appellate courts can and should look to documents and events outside the notice of appeal itself in determining what orders and issues have been appealed and are within the jurisdiction of the appellate courts.

The First Circuit has repeatedly insisted that appellate courts should consider surrounding circumstances – as the Sixth Circuit does not – in interpreting a notice of appeal.

> [B]ecause the "failure to name the underlying judgment is usually a slip of the pen and rarely causes any prejudice to the other side," courts often "rescue the technically defaulted portion of the appeal." ... [W]e review the notice of appeal in the context of the entire record.

Blockel v. J.C. Penney Co., Inc., 337 F.2d 17, 24 (1st Cir. 2003) (quoting *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 415 (1st Cir. 2000)). In *Blockel* the First Circuit, "reviewing the record as a whole," held that issues not expressly mentioned in the notice of appeal were nonetheless within the scope of that notice. The First Circuit relied in part on the appellant's appellate brief, which (like the brief in the instant case) had expressly addressed those issues. 337 F.3d at 24. The First Circuit has repeatedly applied this standard that a notice of appeal is to be construed in light of the contents of the entire record in a case.[15]

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[15] *Chamorro v. Puerto Rican Cars, Inc.*, 304 F.2d 1, 3 (1st Cir. 2002):

> [First Circuit precedent] does not mean ... that an appellate court invariably is bound to read the notice of appeal literally.... [I]nstead, our precedents encourage us to construe notice of appeal liberally and examine them in the context of the record as a whole.

The court in *Chamorro* relied on the appellant's appellate brief in construing his notice of appeal. *Id.* In *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 415 (1st Cir. 2000), the First Circuit relied on the content of the appellant's trial court motions in construing its subsequent notice of appeal. In *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 839 (1st Cir. 1993), the First Circuit explained that a notice of appeal was sufficient to encompass a judgment not mentioned therein

> where the appellant's intent to appeal from the judgment is clear.... In making this assessment, we consider the notice of appeal "in the context of the record as a whole." *Kotler* [*v. American Tobacco Co.*,] 981 F.2d [7,] 11 [(1st Cir. 1992)].

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In the Second Circuit a notice of appeal entails any order or judgment where an "intent to appeal from [that] specific judgment [or order] can fairly be inferred." *Matarese v. LeFevre*, 801 F.2d 98, 105 (2d Cir. 1986). In ascertaining the intent of the appellant, the Second Circuit routinely looks beyond the terms of the notice itself. In *Sahu v. Union Carbide Corp.*, 538 F.3d 59 (2d Cir. 2008), the court relied on the content of the appellant's Pre-Argument Statement, "together" with the notice of appeal, in concluding that the two documents were the "functional equivalent" of a notice of appeal of the order discussed in that statement, but not mentioned in the notice itself. 538 F.3d at 66. In *Mallis v. Bankers Trust Co.*, 717 F.2d 683 (2d Cir. 1983), the court explained that given the overall history of the case, "we cannot see how the notice of appeal ... could have conveyed anything to [the appellee] other than the plaintiffs' dissatisfaction

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The court in *LeBlanc* relied on the content of a separate notice of appeal in construing the disputed notice. *Kotler* explained that "we do not examine the notice in a vacuum but in the context of the record as a whole." 981 F.2d at 11. An earlier decision in that litigation, *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990), announced the same rule.

> In determining whether appellant's notice of appeal, despite their obvious failure to mention the May 1988 order, sufficiently demonstrated an intent to appeal that order, we are not limited to the four corners of the notices, but examine them in the context of the record as a whole.

926 F.2d at 1221.

with the [non-listed] judgment." 717 F.2d at 693.[16] The Second Circuit also applies a second more liberal rule that differs from the standard in most other circuits. Even if the appellant's intent to appeal a particular order or judgment

> cannot be inferred, [if] the appellee "has not been prejudiced" by the inaccuracy and ... has "responded in full" to the appellant's substantive arguments, the court has jurisdiction.

Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 106 (2d Cir. 1998) (quoting *Karuse v. Bennett*, 887 F.2d 362, 367 n.2 (2d Cir. 1989)).

In the Third Circuit it has long been the rule that "if from the notice of appeal *and the subsequent proceedings on appeal* it appears that the appeal was intended to have been taken from an unspecified judgment order or part thereof, the notice may be construed as bringing up the unspecified order for review." *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977) (emphasis added).[17]

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[16] See *Bancroft Nav. Co. v. Chadade S.S. Co.*, 349 F.2d 527, 528 (2d Cir. 1965) ("[u]nder the circumstances specification of the September 23 order in the notice of appeal could hardly have conveyed anything to [the appellee] other than [the appellant's] unwillingness to accept the ... September 14 decision.").

[17] This holding in *Elfman* has been repeatedly applied in the Third Circuit. *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 236 (3d Cir. 2005); *Nationwide Mutual Ins. Co. v. Cosenza*, 258 F.3d 197, 203 n.1 2001); *Shea v. Smith*, 966 F.2d 127, 129 (3d Cir. 1992); *CTC Imports and Exports v. Nigerian Petroleum*

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"[A] policy of liberal construction of notices of appeal prevails in the Third Circuit where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party." *Nationwide Mutual Ins. Co. v. Cosenza*, 258 F.3d 197, 202 n.1 (3d Cir. 2001). That rule was applied most recently in *Satterfield v. Johnson*, 434 F.3d 185 (3d Cir. 2006) (opinion joined by Alito, J.). In *Satterfield* the appellant's "intention to appeal the issue" in question, although the order involved was not mentioned in the notice of appeal, was "'clearly manifest' from its first brief ... [which] devote[d] thirteen pages to [that] issue." 434 F.3d at 191. There was no prejudice to the appellee, which had ample time to include a response in its own appellate brief. *Id.* Similarly, in *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999) (opinion by Alito, J.), the court noted that the defendant "had notice of plaintiffs' intent to appeal" an order not mentioned in the notice of appeal because the appellants "argued the merits of the ... order in their opening appellate brief."

In the Fourth Circuit the requirements of Rule 3(c)(1)(B) are satisfied, regardless of the language of a notice of appeal, if the issue raised by a district court order is briefed by the appellant on appeal.

Corp., 951 F.2d 573, 577 (3d Cir. 1991); *New Castle County v. Hartford Acc. and Indemn. Co.*, 933 F.2d 1162, 1179 n.1 (3d Cir. 1992); *Williams v. Guzzardi*, 875 F.2d 46, 49 (3d Cir. 1989).

> The appellant simply needs to address the merits of a particular issue in her opening brief in order to demonstrate she had the intent to appeal that issue and the appellees were not prejudiced by her mistake, inasmuch as they had notice of the issue and the opportunity to fully brief it.

Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005).[18] That circuit has also noted that an intent to appeal an order can be inferred where that order resolved the sole issue that determined the outcome of the case below. *Dang v. C.I.R.*, 359 F.3d 204, 208 (4th Cir. 2001).

In the Fifth Circuit, where a notice of appeal

> failed to designate or "misdesignated" the ruling being appealed ... we liberally construe the order designation portion of Rule 3(c) and, when the intent to appeal an unnamed or mislabeled ruling is apparent (from the briefs or otherwise) and no prejudice results to the adverse party, the appeal is not jurisdictionally defective.

United States v. Rodriguez, 932 F.2d 374, 375 (5th Cir. 1991). In *Rodriguez* the notice of appeal, "when viewed in isolation, ... would indicate a clear intent

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[18] This Fourth Circuit rule was applied in *United States v. Taylor*, 2000 WL 1763466 at n.* (4th Cir. 2000), *Reardon v. Adden Furniture, Inc.*, 1998 WL 77788 at *4 n.4 (4th Cir. 1998), *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 771 (4th Cir. 1997), and *Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 974 (4th Cir. 1997).

not to appeal [the matter in question]." 932 F.2d at 375-76. The requisite intent to appeal the order in question was demonstrated, however, by the action of the appellant in addressing the matter in question in its appellate brief and by ordering the portions of the trial transcript dealing with that issue. 932 F.2d at 376. The Fifth Circuit has repeatedly relied on appellate briefs or other matters extrinsic to the notice of appeal in determining compliance with Rule 3(c)(1)(B).[19]

> In the Eighth Circuit
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> in accordance with a policy of liberal interpretations of notices of appeal[,] in situations where intent is apparent and there is no prejudice to the adverse party, this court will consider [an] appeal on its merits.

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[19] *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 884 (5th Cir. 1998) (intent demonstrated by brief on appeal); *United States v. Knowles*, 29 F.3d 947, 949-50 (5th Cir. 1994) (intent demonstrated by brief on appeal); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 847 n.1 (5th Cir. 1993) (intent demonstrated by appellate brief and oral argument); *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (intent demonstrated by brief on appeal); *Turnbull v. United States*, 929 F.2d 173, 177 (5th Cir. 1991) (defect in notice may be cured by indication of intent in brief or otherwise); *United States v. Lopez-Escobar*, 920 F.2d 1241, 1244-45 (5th Cir. 1991) (intent demonstrated by brief and statement of issues); *United States v. Rochester*, 898 F.2d 971, 976 n.1 (5th Cir. 1990) ("[f]ailure to properly designate the order appealed from ... may be cured by an indication of intent in the briefs or otherwise"); *McLemore v. River Villa Partnership*, 898 F.2d 996, 1000 (5th Cir. 1990) (intent demonstrated by timing of appeal, status of the case when the notice was filed, and brief).

Simpson v. Norwesto, Inc., 583 F.2d 1007, 1009 n.2 (8th Cir. 1978). In determining the intent of the appellant, the Eighth Circuit relies on considerations other than the content of the notice itself. E.g., *Hawkins v. City of Farmington*, 189 F.3d 695, 703-05 (8th Cir. 1999) (procedural history of the case, appeal information form, statement of issue form, designation of the record); *ELCA Enterprises, Inc. v. Sisco Equipment Rental & Sales, Inc.*, 53 F.3d 186, 189 (8th Cir. 1995) (appeals information Form A); *McAninch v. Traders National Bank of Kansas City*, 779 F.2d 466, 467 n.2 (8th Cir. 1985) (appeal information form and briefs).

The Ninth Circuit applies an interpretation of Rule 3(c)(1)(B) that is avowedly less stringent than in other circuits.

> While some circuits construe Rule 3(c) strictly, ... this circuit has held that "a mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake." *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983).

Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1481 (9th Cir. 1986). That circuit has repeatedly held that the requisite intent is shown if the

appellant's brief addresses the correctness of the order not specified in the notice of appeal.[20]

The Tenth Circuit has been particularly specific in holding that the interpretation of a notice of appeal is not limited to the words of the notice itself. "Even if a notice fails to properly designate the order from which the appeal is taken, this court has jurisdiction if the appellant's intention was clear." *Fleming v. Evans*, 481 F.3d 1249, 1253-54 (10th Cir. 2007). In *United States v. Morales*, 108 F.3d 1213 (10th Cir. 1997), the government sought to appeal the failure of the trial court to impose the minimum mandatory ten years of imprisonment.

> Because the notice of appeal does not indicate the United States intends to appeal the sentence of Mr. Morales, the government failed to comply with Fed.R.App.P. 3(c). Nevertheless, our inquiry does not stop there.... Notwithstanding the wording of the notice of appeal in the present case, we are confident the notice was sufficient to inform Mr.

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[20] *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1171 (9th Cir. 1995) ("[w]e may infer from ... the arguments contained in Simpson's opening brief, that Simpson intended to appeal ... the order"); *Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir. 1994) ("[f]rom his briefs, it is clear that Montes intended to appeal from the [omitted] judgment"); *Levald v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993); *Meehan v. County of Los Angeles*, 856 F.2d 102, 105-06 (9th Cir. 1988); *Lynn*, 804 F.2d at 1481; *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 451 (9th Cir. 1983).

> Morales that the government sought to appeal his sentence.

108 F.3d at 122-23. In holding the notice of appeal was nonetheless sufficient, the Tenth Circuit relied on matters outside the notice itself, the docketing statement the government later filed in the court of appeals, and the fact that the sentence was the only part of the district court decision which the United States could appeal. 108 F.3d at 123.[21] The Tenth Circuit attaches particular weight to documents filed close in time to the notice of appeal itself. *Denver & Rio Grande Western RR. Co. v. Union Pacific RR. Co.*, 119 F.3d 847, 849 (10th Cir. 1997).

The Eleventh Circuit standard is consistent with the majority rule.

> "[I]n this circuit, it is well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent

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[21] See *Cooper v. American Automobile Ins. Co.*, 978 F.2d 602, 607-08 (10th Cir. 1992) (order appealed from determined by examining not only the notice of appeal but also "the supporting papers and particular circumstances surrounding it"; intent demonstrated by appellants' statement of points on which she intended to rely on appeal and by merits brief); *Wright v. American Home Assurance Co.*, 488 F.2d 361, 363 (10th Cir. 1974) ("[a]ppellant's intention to seek review of the judgment is manifest.... [A]ppellant ... briefed the merits, and the appellant's statement of issues similarly demonstrates an intent to challenge the judgment"); *Jones v. Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973) (scope of appeal determined "[b]y looking behind the form of notice").

> was effectively to appeal." *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 439 n.1 (5th Cir. 1980).... Here, it is overwhelmingly clear that the city intended to appeal the district court's ruling.... the appellant's brief addresses *only* that issue.

KH Outdoor, LLC v. Trussville, City of, 465 F.3d 1256, 1259 (11th Cir. 2006) (emphasis in original); see *Cornelius v. Home Comings Financial Network, Inc.*, 293 Fed. Appx. 723, 726 (11th Cir. 2008) ("Cornelius demonstrates 'overriding intent' to effectively appeal the grant of summary judgment.... Two of the three sections in his appellate brief are devoted to arguments concerning the summary judgment").

The District of Columbia Circuit applies a

> well-settled rule that a mistake in designating the specific judgment or order appealed from should not result in loss of the appeal so long as the intent to appeal from a specific judgment can be fairly inferred from the appellant's notice (*and subsequent filings*) and the opposing party is not misled by the mistake.

Foretich v. American Broadcasting Companies, 198 F.3d 270, 273 n.4 (D.C.Cir. 1999) (emphasis added). That circuit has repeatedly held it has jurisdiction to review orders mentioned in the statement of issues filed by the appellant in the court of appeals, even

though the order was not mentioned in the actual notice of appeal.[22]

This inter-circuit conflict has resulted in inconsistent decisions in cases in which the United States filed a notice of appeal that ran afoul of Rule 3(c)(1)(B). On occasions in which it filed a notice of appeal which failed to specify the order it wished to appeal, the government has successfully relied on the liberal construction of Rule 3(c)(1)(B) in the Fifth, Ninth and Tenth Circuits. *United States v. Belgarde*, 300 F.3d 1177, 1180 (9th Cir. 2002) ("all parties understood the government was appealing" the omitted order);[23] *United States v. Morales*, 108 F.3d

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[22] *Messina v. Krakower*, 439 F.3d 755, 759 (D.C.Cir. 2006) (order listed in statement filed under D.C.Cir. R. 28(a)(1)(B) of "Rulings Under Review"); *Independent Petroleum Ass'n of America v. Babbitt*, 235 F.3d 588, 593 (D.C.Cir. 2001) (order listed in "Non-Binding Statement of Issues to be Raised"); *Foretich*, 198 F.3d at 273 n.4 (order listed in "Docketing Statement").

[23] In its brief in *Belgarde*, the United States argued that the content of its appellate brief could be relied on to ascertain the intended scope of the appeal.

> Here, it was obvious that the underlying dismissal of the indictment was at stake.... [I]n its opining brief before this Court, the government explains that because of the arguments expressed in its brief, "the court's *order and judgment* should be reversed." ... The government's presentation in its opening brief deals entirely with the question of whether its indictment was properly dismissed on the merits. Under these circumstances, it is obvious that this appeal is an appeal of the order dismissing the indictment.

Reply Brief of Appellant/Cross Appellee, 2001 WL 34090113, at *10.

1213, 1223 (10th Cir. 1997) (government's intent to appeal demonstrated by government's subsequent docketing statement and fact the omitted order concerned the only issue which the government legally could appeal); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 847 n.3 (5th Cir. 1993) (government's intent to appeal demonstrated by its brief and oral argument); *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979) ("[i]t is apparent the Government intended to appeal both orders"). In *United States v. Glover*, on the other hand, the Sixth Circuit applied its particularly stringent standard to dismiss the government's appeal for failure to comply with Rule 3(c)(1)(B).

B. The Sixth Circuit Standard Is Inconsistent With the Decisions of This Court

The panel opinion rests on two distinct grounds. First, it held that in applying Rule 3(c) the meaning and intent behind a notice of appeal must be determined based solely on the words in the notice itself. The panel acknowledged that Schramm actually intended to appeal the March 25 order, but found the notice of appeal defective because that intent was not apparent on the face of the notice itself.

> It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs. What matters is that Schramm's intent to appeal the March 25, 2008 order is not discernable from the notice of appeal itself. To the contrary, it

> appears from the notice that Schramm intended to appeal only the [February 11, 2008] order....

(App. 15a-16a).

The panel's first reason is squarely inconsistent with the decision of this Court *Foman v. Davis*, 371 U.S. 178 (1962). The appellant in *Foman* had filed a notice of appeal that designated as the order appealed from a decision denying a motion to vacate the judgment and to amend the complaint. The court of appeals held that this notice was insufficient to also designate an earlier order dismissing the complaint; nothing on the face of the notice itself contained any mention of that earlier order. In reversing, this Court did precisely what the panel forbade, expressly relying on materials "beyond the notice of appeal" itself "to discern [the] appellant's intent." The decision in *Foman* rested on the content of an earlier premature notice of appeal and of the papers subsequently filed by appellant in the court of appeals.

> Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal.

371 U.S. at 229-30. Under the holding of the panel in the instant case, neither those briefs, the statement of points nor the other notice of appeal could have been considered.

This Court has repeatedly explained that under *Foman* a court is to consider "all the circumstances" – not merely the circumstances "discernable from the notice of appeal itself" – in deciding whether there has been sufficient compliance with Rule 3(c). *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988); *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 276 n.3 (1991). This Court reiterated this interpretation of Rule 3 in *Becker v. Montgomery*, 532 U.S. 757 (2001).

> [O]pinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to what appellate court.... *Foman v. Davis*, 371 U.S. 178 (1962) (holding that an appeal was improperly dismissed when the record as a whole – including a timely but incomplete notice of appeal and a premature but complete notice – revealed the orders petitioner sought to appeal).

532 U.S. at 657-68.

The panel held, second, that although a notice of appeal regarding a particular order or judgment might in some situations be deemed to encompass another order or judgment, that exception was limited

to cases in which the additional order or judgment had been entered *before* (or simultaneously with) the order or judgment specifically designated in the notice of appeal.

> In each of [the decisions relied on by Schramm], the appellant designated the final judgment or order in the notice of appeal and sought to appeal either an order that preceded the final judgment or a portion of the final judgment. This case is distinguishable in that Schramm seeks to appeal a final order that he did not designate in the notice of appeal, and the order that he did designate in the notice was a *previously*-issued order....

(App. 14a) (emphasis added). The panel's second reason is inconsistent with the this Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). In *FirsTier* the appellant had filed a notice of appeal designating the order appealed from as a January 26, 1989 bench ruling, a premature appeal permitted in some circumstances by Rule 4(a)(2). This Court held that notice of appeal sufficient to encompass the findings of fact and judgment issued by the district court several weeks later, on March 3, 1989. Just as in the instant case, the appellant in *FirsTier* relied on a notice of appeal regarding "a previously-issued order" to present for appeal a challenge to a latter-issued ruling.

> In our view, a notice of appeal from a Rule 4(a)(2) "decision" – that is, a decision that

> would be appealable if immediately followed by the entry of judgment – sufficiently manifests an intent to appeal from the final judgment for purposes of Rule 3(c).

498 U.S. at 276 n.6.

C. This Case Is An Excellent Vehicle For Deciding The Question Presented

This case presents an excellent vehicle for resolving the question presented. The circumstances of this case are a classic application of the Sixth Circuit rule that the scope of a notice of appeal must be determined solely by the content of the notice itself. The same circumstances, on the other hand, would in ten other circuits be held sufficient to confer jurisdiction on the appellate court to review the dismissal of the claim in question.

A lawyer who read only that notice of appeal, and who knew nothing about the content of the February 11, 2008 order or the nature of the underlying lawsuit, undoubtedly would conclude (as the Sixth Circuit) that the issue which Schramm sought to raise on appeal in the retaliatory disqualification lawsuit was the correctness of the February 11 order. Nothing on the face of the notice of appeal itself gives any indication that the February 11 order was actually a decision in another case, and thus could not have been the order which the notice of appeal intended to appeal. The Sixth Circuit standard compels the conclusion that the notice of appeal filed in

the retaliatory disqualification case was an appeal of the February 11 order which actually dismissed the retaliatory assault case.

On the other hand, in the ten circuits which look outside the notice of appeal in applying Rule 3(c)(1)(B), an appellate court would assuredly conclude that the notice of appeal was intended to appeal the dismissal of the retaliatory disqualification action which actually occurred on March 25. First, of course, that would be apparent simply from a reading of the February 11 order, which has nothing to do with the retaliatory disqualification case, and of the March 25 order, which does dispose of that case. Second, the filing in the retaliatory disqualification case of an appeal from the February 11 order cannot have been intended as an appeal of the February 11 order itself, which resolved the retaliatory assault case. The record in the latter case contained a separate notice of appeal in that litigation, and Schramm's counsel had paid two $455 docketing fees in the two cases, clearly intending to initiate two appeals. Third, on April 21, 2008, within the time period for appealing from the dismissal of the retaliatory disqualification case, Schramm had filed in the court of appeals a Statement of Parties and Issues in that case which described the issues in the March 25 order, not those in the February 11 order. Fourth, Schramm's brief on appeal specifically challenged the reasoning and holding of the March 25 order.

In sum, this is precisely the type of case in which the application of Rule 3(c)(1)(B), and the existence of

appellate jurisdiction, turn on whether the court of appeals applies the Sixth Circuit standard or the very different standard utilized in the other circuits.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court held that the anti-retaliation provision of Title VII protects former employees. The decision of the Sixth Circuit effectively nullifies *Robinson* for a substantial and important group of workers.

The Sixth Circuit holds in the instant case that an employer is not liable for retaliation against a former worker if the victim has not been employed for several years and the retaliation occurs outside the workplace. That immunity from liability would, almost by definition, apply to an entire and important category of protected workers: former employees (or, presumably, unsuccessful applicants) who file suit under Title VII against their former employers.

Section 704(a) of Title VII expressly forbids retaliation against an individual because he or she "participated in any manner in a[] ... proceeding, or hearing under this title." 42 U.S.C. § 2000e-3(a). Participation in a lawsuit to enforce Title VII itself lies at the very core of the anti-retaliation protection. For a former employee asserting that he or she was dismissed or forced to resign in violation of Title VII,

a judicial proceeding under Title VII would as a practical matter usually occur "several years [after] the termination of the ... employment." (App. 21a n.2). Because of the exhaustion requirement in Title VII, most Title VII litigation only commences at least a year after a worker's dismissal or resignation, and normally continues for a significant period of time thereafter. Precisely because these plaintiffs are *former* employees, they are unlikely to set foot in their former workplace. Thus retaliation against a former employee who files suit under Title VII will ordinarily fall under the Sixth Circuit rule precluding employer liability for retaliation that is "several years" after the termination of the victim's employment and that "occurred outside of the workplace." (App. 22a).

In the context of Title VII, a rule that employers are not liable for such a category of retaliation is indistinguishable from a holding that that type of retaliation is lawful under section 704(a). Individual supervisors and managers are not personally liable for their role in violations of Title VII. Thus if the employer itself is not liable for a particular action, no one is liable at all. It makes no practical sense to say that retaliation against Schramm, or other former employees who sue their former employers, is "a violation of Title VII's anti-retaliation provision," and yet insist that employers "cannot be held vicariously liable" for that type of violation. (See App. 21a).

The loophole in the Title VII anti-retaliation provision created by the decision below is of considerable

practical importance. A majority of all Title VII lawsuits appear to be filed by former employees; a substantial majority of the employment discrimination cases decided by this Court were brought by such former employees.[24] If, as the Sixth Circuit held, employers are not (at least ordinarily) liable for retaliation against those plaintiffs, the statutory provision protecting these Title VII plaintiffs from retaliation would usually be meaningless.

It is particularly inappropriate that the Sixth Circuit rule, holding that Title VII generally affords no protection for non-workplace retaliation against former employees who file suit, was adopted at the behest of the United States. Only three years ago in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), this Court unanimously rejected the contention there advanced by the Solicitor General that section 704(a) is limited to retaliatory acts involving the "terms and conditions of employment." 548 U.S. at 62-67. "The scope of the anti-retaliation provision," the Court held, "extends beyond workplace-related ... acts and harm." 548 U.S. at 67. In the instant case, the government has obtained – at least for employers in the Sixth Circuit – a holding that employer liability for retaliation against former workers is limited to acts that have a "connection to the workplace" (App. 21a n.2), a connection that for many of those plaintiffs will not exist.

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[24] See Brief Appendix.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

318 Fed.Appx. 337

United States Court of Appeals,
Sixth Circuit.
William SCHRAMM, Plaintiff-Appellant,
v.
Ray LaHOOD, Secretary, Dept. of Transportation,
Defendant-Appellee.
Nos. 08-3420, 08-3421.

March 19, 2009.

On Appeal from the United States District Court for the District Northern of Ohio.

Before: McKEAGUE and GRIFFIN, Circuit Judges; WEBER, Senior District Judge.*

PER CURIAM.

I.

Plaintiff-Appellant William Schramm ("Schramm") filed two retaliation cases under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., against the Secretary of the Department of Transportation ("Secretary"). Although the two cases were consolidated by the district court, they retained their separate case numbers and documents continued to be filed separately in the two cases. The

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* The Honorable Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

district court granted summary judgment in favor of the Secretary in both cases. Schramm filed a notice of appeal in each case, and this court consolidated the two appeals. For the reasons set forth below, we find that the notice of appeal filed in Case No. 08-3420 violates Fed. R.App. P. 3, and we **DISMISS** the appeal for lack of subject matter jurisdiction. We **AFFIRM** the decision of the district court granting summary judgment in favor of the Secretary in Case No. 08-3421.

II.

Schramm was employed by the Federal Aviation Administration ("FAA") in the 1990's as an air traffic controller at the Toledo Express Airport in Toledo, Ohio. In November of 1998, he went on administrative leave from his position, and the following year he retired from the FAA on a disability pension. In May of 2000, Schramm filed an employment discrimination action in federal court against the Secretary, claiming he had been the victim of sex discrimination and retaliation during his employment with the FAA. Among the individuals he named as wrongdoers in the suit was James Blumberg ("Blumberg"), an air traffic control specialist supervisor. Summary judgment was granted in favor of the Secretary and the decision was affirmed on appeal on July 14, 2004.

While Schramm's employment discrimination lawsuit was pending, an incident occurred which led to the filing of the first lawsuit that forms the basis

for the present appeal (hereinafter referred to as the "retaliatory assault case"). The facts surrounding that incident, construed in the light most favorable to Schramm, are as follows: On December 18, 2002, a process server retained by Schramm, William Boden ("Boden"), went to the Toledo Express Airport to serve subpoenas on witnesses in the pending discrimination lawsuit. Boden met with Mark Fischer ("Fischer"), the chief of the airport security personnel, to enlist his assistance in serving four subpoenas on FAA employees working in the air traffic control tower, a restricted area within the terminal building to which members of the public do not have access. Fischer advised Boden to proceed to the tower entrance, where an FAA employee would either grant him admittance or accept the subpoenas. After airport officials decided to deny Boden access to the control tower, Boden was allowed access to a landing area leading to the tower, through which all employees would have to pass when going to or from the tower.

At some point, Boden called Schramm and requested that he come to the airport and identify the individuals to be served as they exited the tower. On Boden's advice, Schramm maintained a distance of 20 feet from the individuals to be served, including Blumberg. Schramm identified Blumberg as he left the tower. Boden pressed a subpoena to Blumberg's shoulder and informed him that he had been served. Blumberg, whose face and body language reflected rage, swung his arm back to avoid contact with Boden and let the subpoena fall to the ground. On the advice

of Boden, Schramm remained in the terminal for a period of time after Blumberg left in order to lessen the chance of encountering Blumberg in the parking lot. Schramm then exited through the main doors of the lobby.

As Schramm made his way to his car, Blumberg pulled around the corner in his pick-up truck and drove alongside Schramm. Blumberg verbally abused Schramm and made comments such as "they were not through with him" and "they would take care of him at trial." Schramm shouted back at Blumberg that he had been served and walked away, after which Blumberg shifted his truck into reverse, drove at Schramm at a high rate of speed, and swung around at the last possible second. Blumberg continued to follow Schramm and verbally abuse him as Schramm walked to the Port Authority Police Station to file a complaint.

On March 20, 2003, Schramm filed a complaint of retaliation with the Equal Employment Opportunity Commission ("EEOC"). Shortly before he did so, a series of events began to unfold which culminated in the filing of Schramm's second retaliation lawsuit (hereinafter the "medical disqualification case"). In February of 2003, after having been on medical disability retirement for taking Zoloft to treat Anxiety Depressive Disorder, Schramm applied to be an air traffic controller for Midwest Air Traffic Controllers ("Midwest Air"), a company that contracts with the FAA to handle air traffic at smaller facilities. On February 5, 2003, he underwent a standard FAA

medical examination conducted by Dr. John Culberson. Schramm informed Dr. Culberson that he had not taken Zoloft in over 90 days, which Dr. Culberson noted on his medical exam. Dr. Culberson issued him a Class II medical certification and transmitted the exam to the appropriate division of the FAA for review. Schramm then went to work as an air traffic controller at the airport in Jackson, Michigan.

In August of 2003, Schramm obtained a position as a contract controller for the United States Department of Defense as part of Operation Enduring Freedom. Because his deployment would last a year, he underwent another standard FAA examination, which was conducted by Gary L. Lynd, D.O. Dr. Lynd, like Dr. Culberson, was an Aviation Medical Examiner ("AME"), who conducted medical examinations on a contract basis for the FAA. Schramm informed Dr. Lynd that he was no longer being treated for anxiety/depression and that he had not taken Zoloft since 2002. Schramm received a Class II medical certificate on August 25, 2003. He was then deployed to Uzbekistan.

On November 7, 2003, Schramm filed his complaint in federal court in the retaliatory assault case, Case No. 3:03cv7655. He claimed that the Secretary had retaliated against him for participating in an activity protected by Title VII, specifically, that Blumberg had assaulted him in retaliation for litigating his sex discrimination suit and the FAA was vicariously liable for Blumberg's conduct as it had

actual and constructive knowledge of that conduct. Schramm served a copy of the summons and complaint on the Secretary on or about December 1, 2003.

On December 30, 2003, Dr. Nestor B. Kowalsky sent Schramm a letter notifying him that he was not qualified for the Class II medical certificates issued to him on February 5, 2003, and August 23, 2003.[1] The letter informed Schramm that a review of his applications and reports of physical examinations of August 25, 2003 and February 5, 2003, disclosed that he did not meet the governing medical standards and that he was not qualified for the airman medical certificate issued to him by the AME "due to history of Anxiety Disorder and/or Depressive Disorder and use of disqualifying medication." As a result of this action, Schramm was forced to terminate his position in Uzbekistan and return to the United States, and his employment with Midwest Air was terminated. Only after Schramm underwent yet another medical examination in January of 2005 was he re-issued a Class II medical certificate by the FAA. Midwest Air did not rehire him until May of 2005.

Plaintiff filed a complaint arising from his medical disqualification on December 28, 2004 (Case No. 3:04cv7782), claiming that the FAA's December 30, 2003 decision denying his Class II medical certification was in retaliation for engaging in activity protected

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[1] The latter certificate was actually issued on August 25, 2003.

by Title VII, specifically, filing the retaliatory assault case against the Secretary on November 7, 2003.

III.

The district court issued a decision on February 11, 2008, 2008 WL 397592, granting summary judgment in favor of the Secretary in the retaliatory assault case on the ground that Schramm could not show that he was engaged in a protected activity, and he therefore could not establish a prima facie case of retaliation. The district court determined that a plaintiff in a civil lawsuit is normally not permitted to be involved in the subpoena process in any respect pursuant to Fed.R.Civ.P. 45(b)(1), which at the time of the court's decision provided that "A subpoena may be served by any person who is not a party and is not less than 18 years of age." The district court found that Schramm could have applied to the court for an order allowing him to assist the process server because of the unusual circumstances, but he did not do so. The court indicated that Schramm had engaged in unreasonable conduct and had flaunted federal aviation policy and the federal rules by identifying for Boden the individuals to be served.

The February 11, 2008 order granting the Secretary's motion for summary judgment and dismissing Schramm's complaint with prejudice in Case No. 3:03 cv7655, the retaliatory assault case, was entered in the medical disqualification case, Case No. 3:04cv7782, on that same date. The order did not, however,

resolve any part of the medical disqualification case, which remained pending. On March 25, 2008, 2008 WL 820463, the district court issued an opinion and order in the medical disqualification case which disposed of the case on the merits. In its opinion, the district court acknowledged that the Secretary did not dispute that the first and third prongs of Schramm's prima facie case were met for summary judgment purposes, i.e., Schramm had engaged in protected activity by filing the first Title VII retaliation lawsuit, and the FAA had taken an adverse employment action against Schramm by finding that he was disqualified from holding a Class II airman's medical certificate. The court also found that the causation prong was satisfied for purposes of the prima facie case in view of the brief period of time – only 53 days – between the filing of the Title VII lawsuit and Schramm's medical disqualification. The court determined, however, that the knowledge element was not satisfied. Specifically, the district court determined that the Flight Surgeon's Office of the FAA did not know of Schramm's lawsuit when it issued the medical disqualification letter.

IV.

Following dismissal of the medical disqualification case, on April 1, 2008, Schramm filed separate notices of appeal in the two retaliation cases. In each notice of appeal, Schramm states that he is appealing from the "Summary Judgment and Termination entered in this action on the 11th day of February,

2008." The only entry dated February 11, 2008, is the opinion and order that disposed of the retaliatory assault case. Schramm failed to designate the March 25, 2008 order that disposed of the medical disqualification case in either notice of appeal, even though he challenged the order in his appellate briefs and the Secretary responded to his arguments.

Although the Secretary did not bring Schramm's omission to our attention, we have a duty to consider sua sponte whether appellate jurisdiction is properly invoked. *See Mattingly v. Farmers State Bank,* 153 F.3d 336, 336 (6th Cir.1998). Accordingly, at oral argument we raised the issue of whether there is a jurisdictional defect in the notice of appeal filed in the medical disqualification case. Following oral argument, the parties submitted briefs on the issue. Schramm alleges that he mistakenly interpreted the February 11, 2008 order as dismissing both retaliation cases, and he misunderstood the March 25, 2008 order to be an additional opinion of the district court which was intended to supplement its earlier order. Schramm explains that this is why he did not mention the March 25, 2008 order in his notice of appeal. He claims that despite his omission, this court has jurisdiction to review the order because his subsequent filings and briefs clearly demonstrate that it was his intent to appeal the March 25, 2008 order and the Secretary understood that such was his intent. Schramm asserts that he stated the substantive issues he intended to address on appeal of the medical disqualification case in the Statement of

Issues and Parties served on the Secretary on April 21, 2008; he contested the district court's decision to dismiss the medical disqualification case in his appellate brief; and the Secretary responded in his brief to the issues Schramm had raised concerning the retaliatory medical disqualification. Schramm claims that he has provided the functional equivalent of what Fed. R.App. P. 3 requires, so this court has jurisdiction to review dismissal of the medical disqualification case.

The Secretary argues that Schramm's failure to properly identify the order being appealed in the medical disqualification case violates Fed. R.App. P. 3(c)(1) and deprives this court of subject matter jurisdiction over the appeal. The Secretary concedes that he was not harmed by the error but argues that the court cannot employ a harmless error or waiver analysis when evaluating defects that go to subject matter jurisdiction.

Fed. R.App. P. 3(c)(1) states that the notice of appeal must

> (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";
>
> (B) designate the judgment, order, or part thereof being appealed; and

> (C) name the court to which the appeal is taken.
>
> Rule 3(c)'s requirements serve two functions:
>
> They address fairness and due process concerns by ensuring that the filing provides sufficient notice to other parties and the courts. And they address administrative concerns by avoiding inconsistency, vagueness and an unnecessary multiplication of litigation caused by uncertainty over who has appealed and from what judgment. Uniting these considerations is notice – notice to the opposing party and the court that an appeal of a given order has been taken and that it has been taken to a certain court. An aspiring notice of appeal thus must specify not just any party but the party . . . taking the appeal; it must designate not just any court but the court to which the appeal is taken; and it must designate not just any order but the . . . order [or orders] . . . being appealed.

Isert v. Ford Motor Co., 461 F.3d 756, 758-59 (6th Cir.2006) (internal quotations and citations omitted).

Rule 3 imposes jurisdictional requirements that may not be waived, even for good cause shown. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Caudill v. Hollan*, 431 F.3d 900, 907 (6th Cir.2005). Nonetheless, despite the mandatory nature of the Rule, its requirements should be liberally construed and applied. *Caudill*, 431 F.3d at 907. "[F]unctional rather

than formalistic compliance is all that is required." *Isert,* 461 F.3d at 759. "[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker v. Montgomery,* 532 U.S. 757, 767, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001); *see also Sanabria v. United States,* 437 U.S. 54, 68 n. 21, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) ("A mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced.")

Although we have loosened the requirement that the notice of appeal name the court to which the appeal is taken, *see Dillon v. United States,* 184 F.3d 556, 558 (6th Cir.1999) (en banc), we have declined to similarly loosen the requirement that the notice of appeal "designate the judgment, order, or part thereof being appealed." *United States v. Glover,* 242 F.3d 333, 337 (6th Cir.2001). We reasoned in *Glover* that to opt for a more relaxed approach in this regard would "too frequently require this Court to sort through a morass of objective and subjective factors to meditate upon and divine the party's intended appellate targets" from among any number of potentially appealable issues that may have arisen prior to an appeal. *Id.* Thus, where an appellant "chooses to designate specific determinations in its notice of appeal, only those determinations may be raised on appeal." *Crawford v. Roane,* 53 F.3d 750, 752 (6th Cir.1995);

see also United States v. Universal Mgmt. Servs., Inc., Corp., 191 F.3d 750, 756 (6th Cir.1999) (appellants were foreclosed from asking the court to review issues rejected in the district court's denial of their motion for reconsideration where their notice of appeal indicated they were appealing only the district court's order on motions for summary judgment).

Schramm cites several of our prior decisions in support of his position that the notice of appeal filed in the medical disqualification case provides the functional equivalent of what Rule 3 requires and we therefore have jurisdiction to review the dismissal of the case. First, he cites *Crawford,* 53 F.3d at 750, where we considered the district court's denial of the plaintiffs' motion for leave to amend, even though the plaintiffs stated in the notice of appeal that they sought review of the district court's judgment denying their motion for summary judgment and granting one defendant's motion for summary judgment. Second, Schramm cites *Caudill,* 431 F.3d at 900, where the notice of appeal stated that the plaintiffs were appealing the order that directed the entry of final judgment but did not specifically mention the judgment itself and did not refer to an earlier order that dismissed claims against one of the defendants in her individual capacity. We interpreted the appeal from the order directing entry of final judgment as tantamount to an appeal from the final judgment itself, and we found we had jurisdiction over the appeal from the order on the individual liability claims pursuant to our rule that "we will entertain

arguments on all objections and asserted errors prior to the final disposition of a case if a party indicates in its notice of appeal that it appeals either the final judgment or the final order in the case." *Id.* at 906. Third, Schramm cites *Taylor v. United States,* 848 F.2d 715 (6th Cir.1988), where we found we had jurisdiction to consider the declaratory judgment aspect of the case as well as the breadth of the injunctive relief ordered as part of the same judgment, even though the notice of appeal designated only the injunctive aspect of the case.

Our prior decisions on which Schramm relies do not support a finding that we have jurisdiction over the notice of appeal filed in the medical disqualification case. In each of these previous cases, the appellant designated the final judgment or order in the notice of appeal and sought to appeal either an order that preceded the final judgment or a portion of the final judgment. This case is distinguishable in that Schramm seeks to appeal a final order that he did not designate in the notice of appeal, and the order that he did designate in the notice was a previously-issued order which disposed of a factually distinct, albeit consolidated, case. There is no exception to the rule that the notice of appeal must designate "the judgment, order, or part thereof being appealed" in a situation such as this.

Schramm also cites two cases from other circuits in support of his argument that a party should be permitted to pursue an appeal from a specific judgment when the intent to do so can be fairly inferred

from the appellant's notice and subsequent filings and when the opposing party is not misled by the mistake. *See Messina v. Krakower,* 439 F.3d 755 (D.C.Cir.2006); *Shapiro ex rel. Shapiro v. Paradise Valley Unified School Dist. No. 69,* 374 F.3d 857 (9th Cir.2004). Insofar as these decisions allow the court to look beyond the notice of appeal to discern an appellant's intent and determine whether the functional requirements of Rule 3 are fulfilled, they are not consistent with the case law of this circuit and Schramm's reliance on them is misplaced. Our precedents do not allow us to examine the circumstances surrounding an appeal in an effort to determine whether an appellant has made a mistake in designating the order he wishes to appeal. They instead require that we hold firm to the requirements of Rule 3(c)(1) and look to the notice of appeal to ascertain the judgments and orders the notice encompasses.

Consistent with our prior decisions, we conclude that the defect in the notice of appeal is jurisdictional and precludes us from entertaining the appeal filed in the medical disqualification case. Schramm concedes that the notice misidentified the order being appealed and designated the February 11, 2008 order, which resolved only the retaliatory assault case. The appeal from that order does not encompass orders issued in the medical disqualification case after February 11, 2008. It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs and that the Secretary was not prejudiced by his mistake in identifying the wrong order. What

matters is that Schramm's intent to appeal the March 25, 2008 order is not discernible from the notice of appeal itself. To the contrary, it appears from the notice that Schramm intended to appeal only the order that granted summary judgment in the retaliatory assault case but which was entered into the record in both that case and the medical disqualification case. Thus, despite the harsh result that a strict application of Rule 3(c)(1) yields in this case, Schramm's failure to designate the March 25, 2008 order in his notice of appeal filed in Case No. 3:04cv7782 compels us to conclude that we lack jurisdiction over the district court's order of that date deciding that Schramm could not establish a retaliation claim under Title VII stemming from his medical disqualification.

V.

We turn then to whether the district court erred by granting summary judgment in favor of the Secretary in the retaliatory assault case and dismissing that lawsuit.

This court reviews a district court's grant of summary judgment *de novo*. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 389 (6th Cir.2008). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A "genuine"

dispute is one that would permit a reasonable jury to return a verdict in favor of the non-moving party. *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 487 (6th Cir.2006). A factual dispute involves a "material" fact only if its resolution could affect the outcome of the litigation under the applicable law. *Id.* At the summary judgment stage, the district court must construe the evidence and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir.2007).

Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), provides that

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) he engaged in activity protected under the statute; (2) the exercise of his civil rights was known by defendant; (3) defendant thereafter took an adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) a causal connection exists

between the protected activity and the adverse employment action or harassment. *See Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 792 (6th Cir.2000).

In *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 67, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), the United States Supreme Court clarified that the scope of Title VII's anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. The Supreme Court fleshed out the provision's standard, explaining that the anti-retaliation provision protects an individual not from all retaliation, but only from retaliation that causes injury or harm. *Id.* The challenged action must be one that a reasonable employee would have found to be "materially adverse," which in the context of a retaliation claim "means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68, 126 S.Ct. 2405 (citing *Rochon v. Gonzales,* 438 F.3d 1211, 1219 (D.C.Cir.2006)). The anti-retaliation provision's standard is phrased in terms of "the reactions of a *reasonable* employee" because "the provision's standard for judging harm must be objective." *Id.* The standard is phrased "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.* at 69, 126 S.Ct. 2405.

The anti-retaliation standard does not require consideration of the underlying conduct that prompted the filing of the Title VII complaint. *Id.* Instead, "the standard is tied to the challenged retaliatory act. . . ."

Id. The Supreme Court in *Burlington* explained that "[b]y focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id.* at 69-70, 126 S.Ct. 2405.

Schramm claims that the district court committed reversible error by holding that he went beyond the bounds of protected conduct and violated Fed.R.Civ.P. 45(b)(1) by identifying Blumberg to the process server, Boden. The Secretary argues that Schramm's conduct violated Rule 45(b)(1) because Schramm was involved in serving a subpoena. The Secretary further argues that Schramm cannot establish a retaliation claim because Blumberg's conduct is not the type of conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." The Secretary contends that a reasonable plaintiff would not serve a trial subpoena and therefore would not fear that he may be assaulted by an employee of a defendant during the subpoena process. Finally, the Secretary denies that he can be held vicariously liable under Title VII for Blumberg's conduct.

The district court's determination that Schramm's conduct in assisting the process server was not protected because it violated Rule 45(b)(1) was erroneous. Schramm complied with the Rule by enlisting the services of Boden to serve the subpoenas.

Schramm came to the airport at Boden's request not to serve the subpoenas himself, but only to identify the individuals on whom Boden was to serve the subpoenas. There is nothing in the text of Rule 45(b)(1) that prohibited Schramm from assisting Boden in this manner. Nor is there anything in the Rule that would have alerted Schramm to the need to obtain a court order before he went to Boden's assistance. Schramm did not flaunt the federal rules in any manner by acting as he did and, contrary to the district court's suggestion, his conduct did not invite Blumberg's threatening and belligerent behavior. Because Schramm's act of assisting with the service of subpoenas in his discrimination lawsuit falls within the purview of Title VII's anti-retaliation provision, and because Blumberg's conduct might well deter a reasonable individual from engaging in such activity, Schramm is not precluded from establishing that he engaged in protected conduct.

We therefore turn to the question of whether the Secretary can be held liable for Blumberg's conduct. The Secretary argues that he cannot be held liable because this case does not fall under any of the categories where vicarious liability is traditionally imposed upon an employer. The Secretary contends that Blumberg did not serve the interest of the FAA in any discernible fashion and he was not aided by his supervisory position in carrying out his personal objective. Schramm counters that as his former supervisor, Blumberg was a decision maker who frequently affected the conditions of his working environment

and he was therefore a proxy for the FAA when he assaulted Schramm.

We find that the Secretary cannot be held vicariously liable under Title VII for Blumberg's conduct based on the peculiar facts of this case. Schramm had not been employed by the FAA for several years when the subpoena incident occurred, and the analyses that courts typically undertake to determine vicarious liability for a violation of Title VII's anti-retaliation provision simply do not apply to these facts. Blumberg was not Schramm's supervisor when he engaged in the wrongful conduct, and the fact that he had supervised Schramm some years before the subpoena incident is not material to the question of whether Blumberg's personal conduct outside of the workplace can be imputed to the Secretary.[2] The Secretary therefore cannot be held liable for Blumberg's conduct based on his supervisory position with the FAA.

Nor is the imposition of liability proper under the analysis applicable to a situation involving retaliatory conduct by a coworker, pursuant to which an

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[2] We do not mean to suggest that vicarious liability can never be imposed under Title VII's anti-retaliation provision for conduct that occurs outside the workplace. In the circumstances presented by this case, however, where several years had elapsed between the termination of the plaintiff's employment and the alleged retaliatory action, which had no connection to the workplace, the mere fact that the person who took the action formerly supervised the plaintiff is immaterial for purposes of imposing vicarious liability.

employer will be liable for a coworker's actions if "(1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances." *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 347 (6th Cir.2008). Blumberg and Schramm cannot be characterized as coworkers at the time of the subpoena incident because they had not worked together for several years. Moreover, this is not a situation where the Secretary could have prevented the offending conduct given that Blumberg's actions were spontaneous and occurred in a non-work setting. Finally, Schramm does not allege on appeal that the Secretary condoned, tolerated or encouraged Blumberg's outrageous conduct in any manner.

In short, because Schramm had not been working at the FAA for several years when the subpoena incident occurred, and because the incident was an isolated, unforeseen event which occurred outside of the workplace, there is no basis for holding the Secretary liable under Title VII for Blumberg's actions against Schramm. Instead, given the unique circumstances of this case, Schramm's proper remedy lies against Blumberg under tort law. We therefore affirm

the district court's grant of summary judgment in favor of the Secretary in the retaliatory assault case, but we do so on the alternative ground that the Secretary is not vicariously liable for Blumberg's actions. *See Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir.2008) (appellate court may affirm the district court's dismissal of the plaintiff's claims on any grounds, including those not relied on by the district court).

VI.

For the reasons set forth above, the appeal filed in the medical disqualification case, No. 08-3420, is **DISMISSED** for lack of jurisdiction. The decision of the district court dismissing the retaliatory assault case, No. 08-3421, is **AFFIRMED**.

2008 WL 397592

United States District Court,
N.D. Ohio,
Eastern Division.
William H. SCHRAMM, Plaintiff,
v.
Norman Y. MINETA, Secretary,
Department of Transportation, Defendant.
No. 3:03CV7655.

Feb. 11, 2008.

S. Joseph Schramm, McKees Rocks, PA, for Plaintiff.

Robert G. Young, Office of the U.S. Attorney, Toledo, OH, for Defendant.

OPINION AND ORDER

CHRISTOPHER A. BOYKO, Judge:

This matter comes before the Court upon the Moion (ECF DKT. # 29) of the United States for Summary Judgment. For the following reasons, the motion is granted.

I. FACTUAL BACKGROUND

Plaintiff William H. Schramm ("Schramm") was formerly employed by the Federal Aviation Administration ("FAA") as an air traffic controller at the Toledo Express Airport in Toledo, Ohio. He went on administrative leave from his position with the FAA in November of 1998 and ultimately retired on a

disability pension from the agency in 1999. In May of 2000, Schramm filed an employment discrimination action in the Northern District of Ohio against the United States Secretary of Transportation, alleging he had been a victim of sex discrimination while employed by the FAA. Plaintiff claimed he was subjected to a hostile work environment, disparate treatment and retaliation for engaging in an activity protected by Title VII of the Civil Rights Act of 1964 ("Title VII"). James Blumberg ("Blumberg"), an air traffic control specialist supervisor, was among the individuals named in that suit. Summary judgment was granted to the FAA in that case by the Magistrate Judge. On July 14, 2004, the Sixth Circuit Court of Appeals affirmed the Magistrate Judge's decision. That lawsuit was pending when the events occurred that form the basis for the instant case.

On December 18, 2002, at the Toledo airport, Schramm assisted a process server in serving subpoenas upon witnesses in the sex discrimination suit for the pending trial. The process server enlisted Schramm to identify the individuals to be served as they exited the tower, after the airport officials denied him access to the control tower. Plaintiff alleges Blumberg, one of his former supervisors, became enraged when he was served with the subpoena and then left the control tower by a side exit. Schramm claims he himself exited through the main doors of the lobby, and as he made his way to his car, Blumberg pulled around the corner in his pick-up truck. While driving alongside of him, Plaintiff states

Blumberg verbally abused him with comments to the effect that "they were not through with him" and "they would take care of him at trial." Plaintiff claims he walked away, which provoked Blumberg to shift his truck into reverse, drive at Plaintiff at a high rate of speed, and swing around at the last possible second to block Plaintiff's path. Schramm alleges Blumberg continued to follow him and verbally abuse him as he walked to the Port Authority Police Station to file a complaint.

On March 20, 2003, Schramm filed a formal Equal Employment Opportunity Commission complaint. Then, on November 7, 2003, Schramm filed his Complaint in U.S. District Court against the FAA for severe retaliatory harassment against Plaintiff for his participation in an activity protected by Title VII of the Civil Rights Act of 1964, § 704, as amended, 42 U.S.C. § 2000e, *et seq.* Schramm alleges Blumberg assaulted him in retaliation for litigating the sex discrimination suit; and since the FAA had actual and constructive knowledge of Blumberg's conduct, the Government is vicariously liable.

II. LAW AND ANALYSIS

Standard of Review

Motion for Summary Judgment

A summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any,

timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See, Fed.R.Civ.P. 56(c). The burden is on the moving party to conclusively show no genuine issue of material fact exists, *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir.1994); and the court must view the facts and all inferences in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the movant presents evidence to meet its burden, the nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex,* 477 U.S. at 324; *Lansing Dairy,* 39 F.3d at 1347; *Lee v. Ritter,* No. 1:02-CV-282, 2005 WL 3369616, at *2 (E.D.Tenn. Dec.12, 2005) This Court does not have the responsibility to search the record *sua sponte* for genuine issues of material fact. *Betkerur v. Aultman Hospital Ass'n.,* 78 F.3d 1079, 1087 (6th Cir.1996); *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 404-06 (6th Cir.1992). The burden falls upon the nonmoving party to "designate specific facts or evidence in dispute," *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and if the nonmoving party fails to make the necessary showing on an element upon which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex,* 477 U.S. at 323; *Lee,* 2005 WL 3369616 at *2.

Whether summary judgment is appropriate depends upon "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Amway Distributors Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir.2003) (quoting *Anderson*, 477 U.S. at 251-52).

Retaliation Under Title VII

Title VII forbids an employer to discriminate against an employee because the employee has "opposed" a practice that Title VII prohibits or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a).

In order to establish a *prima facie* case of retaliation under Title VII, a plaintiff must show: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant took an adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor, and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir.2000). Once a plaintiff has established a *prima facie* case, "the burden of production of evidence shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Id.* at 792-793 (quoting *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). If the defendant cannot establish a legitimate reason for its actions, the plaintiff prevails. *Ceckitti v. City of Columbus,* 14 Fed. Appx. 512, 516 (6th Cir.2001); *see also Cline v. Catholic Diocese of Toledo,* 206 F.3d 651, 658 (6th Cir.2000). If a legitimate reason is established, then the plaintiff must demonstrate, by a preponderance of the evidence, that defendant's proffered reason was pre-textual, i.e., that it "was not the true reason for the employment decision." *Morris,* 201 F.3d at 793 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

Plaintiff Schramm filed a Complaint against the FAA for sex discrimination in May of 2000. Defendant does not dispute that fact, nor contest that prosecuting that Complaint constitutes a protected activity. However, whether Schramm's assisting in serving trial subpoenas upon anticipated witnesses qualifies as a protected activity is genuinely disputed.

In answer to Plaintiff's Request for Admission No. 6 (ECF DKT. # 35), Defendant responds in part as follows:

> "George G. Hughes, Manager of the Toledo Tower, was advised on December 18, 2002 that an individual was at the front door of the facility and wished to serve subpoenas on individuals working in the radar room and tower. He called Howard Lyons, of the Great Lakes Region's Resource Management Branch,

> to determine whether the process server should be afforded access to the secured areas of the facility. After a discussion with Lyons, Hughes decided not to give the process server access to the tower due to safety concerns and a desire not to interrupt the operation, administrative work or training being carried out. Instead, he gave the process server access to the landing area leading to the tower which all employees would have to pass through going to or from work."

In the Court's view, this refusal of the process server's request to enter the radar tower, for non-aviation purposes, and during normal hours of operation, reflects a neutral policy, meant to foster airport security and to insure the safety of employees, as well as incoming and outgoing flights. The tower personnel were responding to the process server, a member of the general public, and not reacting to Plaintiff Schramm. The contention that Plaintiff was consequently "compelled" to assist the process server, and put in the position of "confronting" his former supervisor, James Blumberg, resulting in an assault, was, in reality his own choice and a situation of his own making.

Further, the Court agrees with Defendant, that a plaintiff in a Title VII lawsuit, or in any civil lawsuit, is normally not permitted to be involved in the subpoena process in any respect. Pursuant to Fed.R.Civ.P. 45(b)(1): "A subpoena may be served by any person ***who is not a party*** and is not less than

18 years of age." (Emphasis added). Schramm could have applied to the Court for an order allowing him to assist the process server because of the unusual circumstances. He did not.

Title VII anti-retaliation provisions protect reasonable conduct by the employee in pursuing and participating in litigation. They do not provide license to flaunt the Federal Rules of Civil Procedure, nor do they justify some exception to federal aviation security policy. Schramm's actions were counterproductive and unauthorized. That Schramm was helping to serve subpoenas for a discrimination lawsuit does not excuse him, particularly since he could have secured service by using proper legal channels. Certainly, the Court does not condone Blumberg's tortious conduct – i.e., using a vehicle to assault Schramm and put him in fear of bodily harm. However, if the Court were to adopt Schramm's argument, Title VII plaintiffs would believe themselves entitled, behind the shield of "protected activity", to act outside the procedural rules, and then sue their employers if they suffer an adverse employment action. The Court will not countenance such a result nor establish such a precedent.

III. CONCLUSION

For the foregoing reasons, the Court finds Plaintiff, William H. Schramm, cannot show he was engaged in a protected activity and cannot, therefore, establish a *prima facie* case of retaliation under Title

VII. Thus, the Court grants Defendant's Motion for Summary Judgment and dismisses Plaintiff's Complaint with prejudice.

IT IS SO ORDERED.

2008 WL 820463

United States District Court,
N.D. Ohio,
Eastern Division.
William H. SCHRAMM, Plaintiff,
v.
Norman Y. MINETA, Secretary, Department of Transportation, Defendant.
No. 3:04CV7782.

March 25, 2008.

S. Joseph Schramm, McKees Rocks, PA, for Plaintiff.

Robert G. Young, Office of the U.S. Attorney, Toledo, OH, for Defendant.

CHRISTOPHER A. BOYKO, J.

This matter comes before the Court upon the Motion (ECF DKT # 18) of the United States for Summary Judgment. For the following reasons, the motion is granted.

I. FACTUAL BACKGROUND

William H. Schramm ("Schramm"), formerly employed as an air traffic controller with the Federal Aviation Administration ("FAA"), brings this Title VII action pursuant to 42 U.S.C. § 2000e-3(a), against the Secretary of Transportation in his official capacity, alleging Schramm was subjected to post-employment retaliation. Specifically, Schramm claims the FAA's decision in December of 2003 denying him medical clearance to work as an Air Traffic Control Specialist

for a private contractor was an adverse employment action causally connected to a previous Title VII retaliation claim he filed against the FAA on November 7, 2003, designated as Case No. 3:03CV7655.

In February of 2003, Schramm applied to be an air traffic controller for Midwest Air Traffic Controllers, a company which contracts with the FAA to handle air traffic at smaller facilities. On February 5, 2003, Schramm obtained the necessary Class II medical certification from the Flight Surgeon's Office of the FAA. He then went to work as an air traffic controller at the airport in Jackson, Michigan.

In August of 2003, Schramm applied for, and obtained a position as a contract controller for the Department of Defense as part of Operation Enduring Freedom. Because his deployment would last a year, Schramm underwent another examination and received a Class II medical certificate on August 25, 2003. Schramm was deployed to Uzbekistan, and volunteered for duty in Kabul, Afghanistan.

On November 7, 2003, Schramm filed Case No. 3:03CV7655, alleging the FAA had retaliated against him in violation of Title VII of the Civil Rights Act of 1964, when a supervisor assaulted Schramm shortly after being served with a subpoena to appear at the trial of Schramm's first Title VII action. Schramm served a copy of the Complaint and Summons on the Department of Transportation on or about December 1, 2003.

On December 30, 2003, Dr. Nestor B. Kowalsky ("Kowalsky") sent Schramm a letter, notifying him he was not qualified for the Class II airman's medical certificates issued to him on August 23, 2003 and February 5, 2003, due to his history "for taking Zoloft and for Anxiety Depressive Disorder." (Plaintiff's Opposition Brief, ECF DKT # 44, p. 9). Schramm contends the decision of the Flight Surgeon finding him unqualified was in retaliation for initiating the Title VII lawsuit of November 7, 2003 against the FAA.

Only after Schramm underwent yet another medical examination in January of 2005, was he issued a Class II medical certificate by the FAA; and Midwest Air did not re-hire him until May of 2005.

Schramm alleges, as a direct result of the retaliatory conduct of the FAA, he was forced to terminate his position controlling traffic in Uzbekistan for the Department of Defense; he was forced to return to the United States; his employment with Midwest Air was terminated; he was forced to pay additional income taxes, penalties, and interest; and he was forced to incur additional traveling and living expenses he would not otherwise have had to incur.

Defendant United States submits summary judgment in its favor is appropriate with respect to the above-captioned Title VII retaliation claim.

II. LAW AND ANALYSIS

Standard of Review

Motion for Summary Judgment

A summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See, Fed.R.Civ.P. 56(c). The burden is on the moving party to conclusively show no genuine issue of material fact exists, *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir.1994); and the court must view the facts and all inferences in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Once the movant presents evidence to meet its burden, the nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex,* 477 U.S. at 324; *Lansing Dairy,* 39 F.3d at 1347; *Lee v. Ritter,* No. 1:02-CV-282, 2005 WL 3369616, at *2 (E.D.Tenn. Dec. 12, 2005). This Court does not have the responsibility to search the record *sua sponte* for genuine issues of material fact. *Betkerur v. Aultman Hospital Ass'n.,* 78 F.3d 1079, 1087 (6th Cir.1996); *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 404-06 (6th Cir.1992). The burden falls upon the nonmoving party to "designate specific facts or evidence in dispute,"

Anderson v. Liberty Lobby, Inc., 477 U .S. 242, 249-50 (1986); and if the nonmoving party fails to make the necessary showing on an element upon which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323; *Lee*, 2005 WL 3369616 at *2. Whether summary judgment is appropriate depends upon "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Amway Distributors Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir.2003) (quoting *Anderson*, 477 U.S. at 251-52).

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Title VII forbids an employer to discriminate against an employee because the employee has "opposed" a practice that Title VII prohibits, or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a).

In order to establish a *prima facie* case of retaliation under Title VII, a plaintiff must show: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant took an adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor, and (4) there was a causal connection between the protected activity and the adverse

employment action or harassment. *Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 792 (6th Cir.2000). The burden of establishing a *prima facie* case is not onerous; and, in fact, is a burden easily met. *Nguyen v. City of Cleveland,* 229 F.3d 559, 563 (6th Cir.2000). A *prima facie* case is defined as "sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a nonjury case; it is the evidence necessary to require defendant to proceed with his case." *Black's Law Dictionary* 1190 (6th Ed.1990). Once a plaintiff has established a *prima facie* case, "the burden of production of evidence shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Morris,* 201 F.3d at 792-793 (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973)). If the defendant cannot establish a legitimate reason for its actions, the plaintiff prevails. *Ceckitti v. City of Columbus,* 14 Fed. Appx. 512, 516 (6th Cir.2001); *see also Cline v. Catholic Diocese of Toledo,* 206 F.3d 651, 658 (6th Cir.2000). If a legitimate reason is established, then the plaintiff must demonstrate, by a preponderance of the evidence, that defendant's proffered reason was pre-textual, i.e., that it "was not the true reason for the employment decision." *Morris,* 201 F.3d at 793 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981)).

In the case at bar, Defendant does not dispute the first prong of Plaintiff's *prima facie* retaliation claim. It is unquestioned that Schramm engaged in

activity protected by Title VII before and after the termination of his employment with the FAA. Moreover, for purposes of this summary judgment analysis, Defendant concedes the decision of the Flight Surgeon in December of 2003, finding Schramm was disqualified from holding a Class II airman's medical certificate, was an employment action adverse to Plaintiff.

It is significant, and undisputed, that Schramm was medically disqualified from holding a Class II airman's medical certificate only fifty-three days after he filed a Title VII lawsuit against the FAA. Temporal proximity between the protected activity and the retaliatory conduct, when combined with other factors, may be sufficient indirect evidence to create an inference of retaliatory motive. *Singfield v. Akron Metro. Housing Auth.,* 389 F.3d 555 (6th Cir.2004); *Dicarlo v. Potter,* 358 F.3d 408 (6th Cir.2004); *Nguyen, supra.* In view of the minimum burden of proof for a *prima facie* case, this Court will consider the causation prong of Schramm's retaliation case satisfied.

However, the Court must undertake a critical analysis of the remaining element of Plaintiff Schramm's proof, i.e., Defendant's knowledge of his protected activity. Schramm points out his 2003 lawsuit was known at the regional level of the FAA. The Office of the Regional Counsel was aware (Answers to Plaintiff's requests for Admissions, Interrogatories and Requests for Production of Documents, Exhibit # 30) as were the Tower Manager and the Great

Lakes Region's Resource Management Branch (Answers to Plaintiff's Interrogatories, Exhibit # 36).

Plaintiff Schramm's medical examination summaries have a computer date stamp of "11/18/03" at the bottom, which Schramm presents as circumstantial evidence his files were accessed by the Flight Surgeon's Office eleven days after he filed his Title VII action. According to Plaintiff, Joan Morgan, a program analyst for the FAA Flight Surgeon's Office, could not, or would not, identify at her deposition who directed her to access Plaintiff's files on 11/18/03. Plaintiff presumes that direction would have come from the Air Traffic Division or Legal Counsel, or both.

Plaintiff also directs the Court's attention to notes, presumably written by Deputy Flight Surgeon, Robert E. Liska, M.D., referencing an Alternative Dispute Resolution process in Plaintiff's initial lawsuit, which were improperly placed in Plaintiff's medical file, and "presented a negative view" of Schramm.

In Schramm's estimation, the correspondence of December 30, 2003, disqualifying him from controlling air traffic, has a "legal slant" and could not have been written solely by someone in the Flight Surgeon's Office.

On the other hand, Defendant denies knowledge of Schramm's protected activity prior to its December 30, 2003 determination of disqualification; Defendant contradicts Schramm's purported "plethora" of facts,

and Defendant submits sworn supporting evidence. Dr. Kowalsky, who authored the December 30, 2003 notice of disqualification, avers he had no knowledge of Plaintiff's prior Title VII complaints until sometime after March 19, 2004. (Kowalsky Affidavit at p. 1). Joan Morgan avers she learned about Plaintiff's "EEO complaint in about April 2004, when the EEO investigator came to talk to the Regional Flight Surgeon," and denies any "knowledge of any other EEO complaints or activity by him." At her deposition, Morgan acknowledged the date stamp of 11/18/03 on Plaintiff's medical file, but denied knowing what it means. (Morgan Depo. at 84). She also specifically denied anyone from Air Traffic or Legal requested her to access Plaintiff's files. (Morgan Depo. at 86). The medical disqualification issue was not discussed with anyone outside the Flight Surgeon's Office. (Morgan Depo. at 101). The disqualification correspondence was prepared by Morgan for Kowalsky's signature and was drafted using a master form letter. (Morgan Depo. at 101-104). The decision to disqualify Schramm from controlling air traffic was a medical decision, made without reference to prior EEO/Title VII complaints or litigation. When asked about the influence of Schramm's prior litigation history on the disqualification decision, Morgan responded: "None, not accessed, not reviewed, not a consideration." (Morgan Depo. at 104).

In sum, Defendant counters each item of Plaintiff Schramm's circumstantial proof on the element of knowledge with sworn testimony in affidavit or

deposition form. This Court acknowledges that Plaintiff's burden in his *prima facie* retaliation case is not onerous. However, Schramm has not provided any evidence from which reasonable inferences can be drawn by a fact-finder; rather, Schramm provides only speculation of what was known or contemplated by the Flight Surgeon's Office of the FAA when the disqualification letter of December 30, 2003 was issued.

III. CONCLUSION

For the foregoing reasons, this Court finds Plaintiff has not satisfied his burden of establishing Defendant's knowledge of his protected activity by evidence of any sort, direct or circumstantial, sufficient to create a reasonable inference of a retaliatory motive. Plaintiff, William H. Schramm, has failed to demonstrate a *prima facie* case of retaliation under Title VII; and therefore, Defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

No. 08-3420/3421

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM H. SCHRAMM, Plaintiff-Appellant, v. RAY LAHOOD, SECRETARY, DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.	)	ORDER (Filed Jul. 14, 2009)

BEFORE: MCKEAGUE and GRIFFIN, Circuit Judges; and WEBER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

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* Hon. Herman J, Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

Rule 3(c)(1) of the Federal Rules of Appellate Procedure, provides in part:

> (c) Contents of the Notice of Appeal.
>
> (1) The notice of appeal must:
>
> * * *
>
> (B) designate the judgment, order or part thereof being appealed,
>
> * * *

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a) provides:

> It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

EMPLOYMENT DISCRIMINATION CASES IN THE SUPREME COURT OF THE UNITED STATES BROUGHT BY FORMER EMPLOYEES

In cases in which the underlying claim challenged the dismissal of the plaintiff, the plaintiff is referred to as a discharged employee

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (action under the Americans with Disabilities Act brought by discharged employee)

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (action under Title VII brought by discharged employee)

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) (action under Title VII brought by former employee)

Arline v. School Bd. of Nassau county, 480 U.S. 273 (1987) (action under the Rehabilitation Act brought by discharged employee)

Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991) (action under the Age Discrimination in Employment Act brought by former employee)

AT&T Corp. v. Hulteen, 129 S.Ct. 1962 (2009) (action under Title VII brought by retired employees)

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (action under Title VII brought by former employee)

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1988) (action under Title VII brought by former employee)

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) (action under the Age Discrimination in Employment Act brought by discharged employee)

CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951 (2008) (action under 42 U.S.C. § 1981 brought by discharged employee)

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) (action under the Americans with Disabilities Act brought by former employee)

Consolidated Rail Corp. v. Darrone, 465 U.S. 824 (1984) (action under the Rehabilitation Act brought by discharged employee)

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (action under Title VII brought by discharged employee)

Crawford v. Metropolitan Government of Nashville and Davidson County, 129 S.Ct. 846 (2009) (action under Title VII brought by discharged employee)

Crown Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (action under Title VII brought by discharged employee)

Delaware State College v. Ricks, 449 U.S. 250 (1980) (action under Title VII brought by discharged employee)

Desert Palace v. Costa, 539 U.S. 90 (2003) (action under Title VII brought by discharged employee)

Edelman v. Lynchburg College, 535 U.S. 106 (2002) (action under Title VII brought by discharged employee)

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (action under Title VII brought by former employee)

Federal Express Corp. v. Holowecki, 128 S.Ct. 1147 (2008) (action under the Age Discrimination in Employment Act brought by former and current employees)

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (action under Title VII brought by former and current employees)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (action under the Age Discrimination in Employment Act brought by discharged employee)

Great American Federal Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) (action under 42 U.S.C. § 1985(3) brought by discharged employee)

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) (action under Title VII brought by former employee)

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (action under the Age Discrimination in Employment Act brought by discharged employee)

Hishon v. King & Spaulding, 467 U.S. 69 (1984) (action under Title VII brought by discharged employee)

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) (action under Title VII brought by discharged employee)

Jett v. Dallas Ind. School Dist., 491 U.S. 701 (1989) (action under 42 U.S.C. § 1981 brought by former employee)

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (action under 42 U.S.C. § 1981 brought by discharged employee)

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004) (action under 42 U.S.C. § 1981 brought by discharged and former employees)

Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (action under the Age Discrimination in Employment Act brought by former and current employees)

Kremer v. Chem. Const. Corp., 456 U.S. 461 (1982) (action under Title VII brought by discharged employee)

Landgraf v. USI Film Products, 511 U.S. 244 (1994) (action under Title VII brought by former employee alleging constructive discharge)

Ledbetter v. The Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162 (2007) (action under Title VII brought by retired employee)

Loeffler v. Frank, 486 U.S. 549 (1988) (action under Title VII brought by discharged employee)

Lorillard v. Pons, 434 U.S. 575 (1978) (action under the Age Discrimination in Employment Act brought by discharged employee)

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) (action under Title VII and 42 U.S.C. § 1981 brought by discharged employee)

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) (action under 42 U.S.C. § 1981 brought by discharged employee)

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) (action under the Age Discrimination in Employment Act brought by discharged employee)

Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395 (2008) (action under the Age Discrimination in Employment Act brought by discharged employee)

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (action under Title VII brought by former employee)

Mohasco v. Silver, 477 U.S. 807 (1988) (action under Title VII brought by discharged employee)

Murphy v. United Parcel Service, 527 U.S. 516 (1999) (action under the Americans with Disabilities Act brought by discharged employee)

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) (action under the Family and Medical Leave Act brought by discharged employee)

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) (action under Title VII brought by discharged employees)

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) (action under the Age Discrimination in Employment Act brought by discharged employee)

Office of Senator Dayton v. Hanson, 127 S. Ct. 2018 (2007) (action under the Congressional Accountability Act brought by discharged employee)

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (action under Title VII brought by former employee)

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) (action under the Age Discrimination in Employment Act brought by retired employee)

Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998) (action under the Age Discrimination in Employment Act brought by former employee alleging constructive discharge)

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) (action under Title VII brought by former employee alleging constructive discharge)

Pollard v. E.I. Du Pont De Nemours & Co., 532 U.S. 843 (2001) (action under Title VII brought by former employee)

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) (action under Age Discrimination Employment Act brought by retired employee)

Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (action under the Americans with Disabilities Act brought by former employee)

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (action under the Age Discrimination Employment Act brought by discharged employee)

Rivers v. Roadway Exp. Inc., 511 U.S. 298 (1994) (action under 42 U.S.C. § 1981 brought by discharged employee)

Robinson v. Shell Oil, 519 U.S. 337 (1997) (action under Title VII brought by former employee)

Saint Francis College v. Al-Khazraji, 481 U.S. 640 (1987) (action under 42 U.S.C. § 1981 brought by former employee)

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) (action under the Rehabilitation Act brought by discharged employee)

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US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (action under the Americans with Disabilities Act brought by discharged employee)

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No. 09-440

In the Supreme Court of the United States

WILLIAM H. SCHRAMM, PETITIONER

v.

RAY L. LAHOOD, SECRETARY, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
BENJAMIN S. KINGSLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a notice of appeal that failed to designate the order from which appeal was sought and designated only an unrelated order from a separate case did not satisfy the requirement of Fed. R. App. P. 3(c)(1)(B) to "designate the judgment, order, or part thereof being appealed."

2. Whether Fed. R. App. P. 3 is jurisdictional.

3. Whether the court of appeals erred in holding that petitioner's allegation of a spontaneous assault by a former supervisor three years after he left the employ of the Federal Aviation Administration did not state a valid retaliation claim against the Secretary of Transportation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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In the Supreme Court of the United States

No. 09-440

WILLIAM H. SCHRAMM, PETITIONER

v.

RAY L. LAHOOD, SECRETARY, DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not published in the *Federal Reporter* but is available at 318 Fed. Appx. 337. The February 11, 2008 order of the district court (Pet. App. 24a-32a) is not published but is available at 2008 WL 397592. The March 25, 2008 order of the district court (Pet. App. 33a-42a) is not published but is available at 2008 WL 820463.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2009. A petition for rehearing was denied on July 14, 2009 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on October 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. During the 1990s, petitioner worked as an air traffic controller for the Federal Aviation Administration (FAA). In November 1998, petitioner began an administrative leave and retired the following year because of a psychological disability that rendered him unqualified to continue work as an air traffic controller. In May 2000, petitioner filed an action in federal court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against the Secretary of Transportation (Secretary), alleging that he had been the victim of sex discrimination during his time as an air traffic controller. The suit identified James Blumberg, a former supervisor, as one of the discriminating individuals. Summary judgment was granted in favor of the Secretary, and the decision was affirmed on appeal in July 2004. Pet. App. 2a.

While that discrimination suit was pending, petitioner asserts that two unrelated incidents of unlawful retaliation occurred. In response, petitioner filed two separate retaliation suits against the Secretary under Title VII. Those two retaliation suits give rise to the present petition.

2. Petitioner's first retaliation suit alleged a retaliatory assault. On December 18, 2002, petitioner's process server went to the airport to serve subpoenas on witnesses, including Blumberg, for the pending discrimination suit. The process server was denied entry to the control tower where the witnesses worked, but was allowed to wait in an adjacent area through which all employees needed to pass. Because the process server could not identify the witnesses, he telephoned petitioner, who came to the airport to assist in the identification. Petitioner alleges that he identified Blumberg as

Blumberg left the tower, that the process server pressed a subpoena onto Blumberg's shoulder, and that Blumberg swung his arm back in anger to avoid contact, causing the subpoena to fall to the ground. Pet. App. 3a.

Following this incident, petitioner waited for a period of time in the terminal after Blumberg left. As petitioner exited, he alleges that Blumberg drove around the corner of the building in a pick-up truck, pulled up alongside him, and began verbally abusing him. Petitioner alleges that he shouted to Blumberg that he had been served and then walked away, at which point Blumberg shifted his truck into reverse and drove towards petitioner before swerving away. Pet. App. 4a.

On November 7, 2003, petitioner filed a Title VII complaint in federal court alleging retaliatory assault. Petitioner alleged that Blumberg had assaulted him in retaliation for litigating his sex discrimination suit and that this assault constituted a form of retaliation by his former employer within the meaning of Title VII. Pet. App. 5a. Petitioner did not specifically allege that anyone at the FAA or that any of Blumberg's supervisors had knowledge of or condoned the alleged assault. He alleged only generally, using boilerplate language, that "the FAA had actual and constructive notice of the harassment described in this complaint." 3:03cv7655 Compl. ¶ 16 (N.D. Ohio Nov. 7, 2003).

3. Petitioner's second retaliation suit involved an unrelated series of events culminating in a medical disqualification. In February 2003, petitioner was hired as an air traffic controller for an FAA contractor that handles air traffic at smaller airports. As part of the hiring process, petitioner was required to apply for an FAA medical certification. He applied for and received the certification, indicating on his application that he was no

longer disabled nor taking any medications that would have disqualified him for a job as an air traffic controller. Pet. App. 4a-5a.

In August 2003, petitioner obtained a position with the United States Department of Defense, after which he was certified again, and was deployed to Uzbekistan. Pet. App. 5a.

On December 30, 2003, the FAA issued a letter notifying petitioner that, as part of a standard review process, it had determined he was not qualified for certification without a comprehensive psychological evaluation. After he underwent a medical examination by a psychiatrist in January 2005, petitioner received a new certificate. Pet. App. 6a.

On December 28, 2004, petitioner filed his second Title VII retaliation complaint in district court, alleging that the FAA's December 2003 decision to revoke his medical certification was in retaliation for his filing of the retaliatory assault case against the Secretary in November 2003. Pet. App. 6a-7a.

4. The two retaliation cases were consolidated by the district court but retained separate case numbers, and documents continued to be filed separately in each case. Pet. App. 1a-2a, 5a-6a. In a February 11, 2008 order, the district court granted summary judgment to the Secretary in the retaliatory assault case. *Id.* at 24a-32a. The court held that petitioner was not engaged in a protected activity at the time of the assault and therefore could not establish a prima facie case of retaliation under Title VII. *Id.* at 28a-31a. Although that order was entered in both retaliation cases, it did not address the medical disqualification suit. *Id.* at 7a-8a.

In a March 25, 2008 order, the district court granted summary judgment to the Secretary in the medical dis-

qualification case. Pet. App. 33a-42a. The court held that petitioner had not stated a prima facie case for retaliation under Title VII because he had not come forward with evidence to show that the responsible FAA officials had known about petitioner's retaliatory assault suit when they issued the medical disqualification letter. *Id.* at 39a-42a.

5. a. On April 1, 2008, following the second grant of summary judgment, petitioner filed notices of appeal in each of the two cases. Pet. App. 8a. In each notice of appeal, petitioner stated that he was appealing from the "Summary Judgment and Termination entered in this action on the 11th day of February, 2008." *Id.* at 8a-9a. The only order dated February 11, 2008 in either case is the order granting summary judgment in the retaliatory assault action. Petitioner did not designate the March 25 order disposing of the medical disqualification case in either of his notices of appeal. *Id.* at 9a.

On April 21, 2008, petitioner filed two statements of issues with the court of appeals, one for each case. Although the statement of issues in the medical disqualification case identified the medical disqualification issue, it again designated only the February 11 order disposing of the retaliatory assault case. 08-3420 Statement of Parties and Issues (6th Cir. filed Apr. 21, 2008). Petitioner thus did not designate the district court's March 25 order in either of the notices of appeal or in either of his statements of issues.

b. The court of appeals consolidated the two appeals and dismissed in part and affirmed in part in an unpublished *per curiam* opinion. Pet. App. 1a-23a.

The court of appeals raised sua sponte the question whether there had been an effective notice of appeal from the March 25 order in the medical disqualification

case. After ordering supplemental briefing on that question, the court dismissed that appeal. The court explained that Fed. R. App. P. 3(c)(1)(B) requires that a notice of appeal "designate the judgment, order, or part thereof being appealed," and that circuit precedent did not permit the court to look beyond the notice of appeal to surmise what orders or rulings a party might have intended to appeal. Based on petitioner's failure to designate the March 25 order, the court held that petitioner had not properly noticed an appeal from the order granting summary judgment in that case. Stating that Rule 3 imposes jurisdictional requirements that may not be waived, the court dismissed the appeal in the medical disqualification case for lack of jurisdiction. Pet. App. 10a-16a.

The court of appeals next affirmed the district court's grant of summary judgment to the Secretary in the retaliatory assault case. Pet. App. 16a-23a. Although the court concluded that a genuine issue of material fact existed as to whether petitioner had engaged in protected conduct in assisting the process sever, it held that the Secretary could not be held vicariously liable under Title VII for Blumberg's conduct. Specifically, the court relied on the "peculiar facts of this case," including that petitioner had not been employed by the FAA for several years, that Blumberg was no longer his supervisor, and that Blumberg's actions were "spontaneous and occurred in a non-work setting." *Id.* at 21a-22a. The court concluded that because of "the unique circumstances of this case, [petitioner]'s proper remedy lies against Blumberg under tort law," not against the Secretary under Title VII. *Id.* at 22a.

ARGUMENT

1. Petitioner, represented by counsel, filed notices of appeal in each of two separate cases. Each notice of appeal designated only the February 11, 2008 order disposing of the retaliatory assault case, and neither designated the March 25, 2008 order in the medical disqualification case. Pet. App. 8a-9a. Petitioner nonetheless contends (Pet. 13-35) that he should be permitted to appeal the March 25 order. Petitioner argues that in evaluating whether he satisfied Fed. R. App. P. 3(c)(1)(B)'s explicit requirement to "designate the judgment, order, or part thereof being appealed," the court should have looked beyond the notice of appeal itself to other circumstances indicating his intent to appeal the March 25 order. According to petitioner, ten other circuits hold that under Rule 3(c)(1)(B) "appellate courts can and should look to documents and events outside the notice of appeal itself in determining what orders and issues have been appealed." Pet. 17. But an examination of the holdings of the cases petitioner cites reveals no clear conflict. All of the circuits, including the Sixth Circuit, attempt to determine the intent of the appellant. Although the circuits differ in the materials they consider in determining that intent in cases involving orders covering related issues or claims, no circuit appears to permit appeal of an undesignated order that is wholly unrelated to the order designated in the notice of appeal. Accordingly, further review is not warranted in this case.

a. Petitioner cites at least nine cases from other circuits permitting appeal of certain non-final orders preceding a final judgment in a case even when a notice of appeal designates only the order representing the final

judgment.[1] That is also the practice in the Sixth Circuit. See *Caudill* v. *Hollan*, 431 F.3d 900, 905-906 (2005); *Crawford* v. *Roane*, 53 F.3d 750, 752-753 (1995), cert. denied, 517 U.S. 1121 (1996); *Caldwell* v. *Moore*, 968 F.2d 595, 598 (1992). Similarly, petitioner cites numerous cases from other circuits permitting appeal of an underlying judgment (or some aspect thereof) even when the notice of appeal designates only an order resolving post-judgment motions.[2] That too is the practice

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[1] See *Sahu* v. *Union Carbide Corp.*, 548 F.3d 59, 65-66 (2d Cir. 2008); *New York Life Ins. Co.* v. *Deshotel*, 142 F.3d 873, 884 (5th Cir. 1998); *Hartsell* v. *Duplex Prods., Inc.*, 123 F.3d 766, 771 (4th Cir. 1997); *ELCA Enters., Inc.* v. *Sisco Equip. Rental & Sales*, 53 F.3d 186, 189 (8th Cir. 1995); *Montes* v. *United States*, 37 F.3d 1347, 1351 (9th Cir. 1994); *Levald, Inc.* v. *City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993), cert. denied, 510 U.S. 1093 (1994); *United States* v. *Ramirez*, 932 F.2d 374, 375-376 (5th Cir. 1991); *Taylor* v. *United States*, 848 F.2d 715, 718 (6th Cir. 1988); *Wright* v. *American Home Assurance Co.*, 488 F.2d 361, 363 (10th Cir. 1973).

[2] See *Cornelius* v. *Home Comings Fin. Network, Inc.*, 293 Fed. Appx. 723, 726 (11th Cir. 2008); *Messina* v. *Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006); *Blockel* v. *J.C. Penney Co.*, 337 F.3d 17, 24 (1st Cir. 2003); *Chamorro* v. *Puerto Rican Cars, Inc.*, 304 F.3d 1, 4 (1st Cir. 2002); *Independent Petroleum Ass'n of Am.* v. *Babbitt*, 235 F.3d 588, 593 (D.C. Cir. 2001); *Town of Norwood* v. *New Eng. Power Co.*, 202 F.3d 408, 415 (1st Cir.), cert. denied, 531 U.S. 818 (2000); *Pacitti* v. *Macy's*, 193 F.3d 766, 777 (3d Cir. 1999); *Foretich* v. *ABC*, 198 F.3d 270, 273 n.4 (D.C. Cir. 1999); *Ametex Fabrics, Inc.* v. *Just In Materials, Inc.*, 140 F.3d 101, 106 (2d Cir. 1998); *United States* v. *Morales*, 108 F.3d 1213, 1222-1223 (10th Cir. 1997); *LeBlanc* v. *Great Am. Ins. Co.*, 6 F.3d 836, 839 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994); *Turnbull* v. *United States*, 929 F.2d 173, 178 (5th Cir. 1991); *United States* v. *Lopez-Escobar*, 920 F.2d 1241, 1244 (5th Cir. 1991); *Friou* v. *Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991); *Mallis* v. *Bankers Trust Co.*, 717 F.2d 683, 693 (2d Cir. 1983); *Simpson* v. *Norwesco, Inc.*, 583 F.2d 1007, 1009 n.2 (8th Cir. 1978); *Jones* v. *Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973).

in the Sixth Circuit. See *Harris* v. *United States*, 170 F.3d 607, 608 (1999); *Boburka* v. *Adcock*, 979 F.2d 424, 426 (1992), cert. denied, 508 U.S. 961 (1993). These two situations describe the great majority of the cases relied on by petitioner. See Pet. 17-29.

Petitioner cites some other cases in which courts of appeals have looked outside the notice of appeal, but they are distinguishable from the present context. In those cases, the courts inferred an undisputed intent to appeal the undesignated issues and orders primarily when those issues and orders were closely related to those designated in the notice of appeal. For example, courts have looked beyond the notice of appeal when determining whether a prior non-appealable order should be deemed encompassed within the designation of the final judgment (consistent with the uniform rule noted above, see note 1, *supra*). See, *e.g.*, *Montes* v. *United States*, 37 F.3d 1347, 1351 (9th Cir. 1994). And they have done so where the notice of appeal itself had designated an order raising a related issue or claim. See, *e.g.*, *Satterfield* v. *Johnson*, 434 F.3d 185, 190-191 (3d Cir.) (permitting appeal of timeliness issue where appellant had designated a merits issue from the same order), cert. denied, 549 U.S. 947 (2006); *KH Outdoor, LLC* v. *City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006 (permitting appeal of order granting nominal damages where appellant had designated subsequent order setting amount of nominal damages); *Bogart* v. *Chapell*, 396 F.3d 548, 554-555 (4th Cir. 2005) (permitting appeal of order denying motion to amend judgment based on new evidence where appellant had designated entry of the underlying judgment); *Simpson* v. *Lear Astronics Corp.*, 77 F.3d 1170, 1173 (9th Cir. 1995) (inferring from "both [appellant]'s notice of appeal, stating that he was

appealing the 'order to pay attorney fees,' and the arguments contained in [appellant]'s opening brief, that [appellant] intended to appeal both the order imposing sanctions and the order setting their amount").

Here, by contrast, petitioner's notice of appeal in the medical disqualification case did not designate any order related to an issue in that case or to the March 25 summary judgment order, but rather designated only the February 11 order granting summary judgment in the separate retaliatory assault case. When a notice of appeal designates an order resolving a certain claim or case, the courts of appeals have held that Rule 3(c)(1)(B) does not permit appellate review of orders disposing of completely unrelated claims or cases. See, *e.g.*, *Kotler* v. *American Tobacco Co.*, 981 F.2d 7, 11 (1st Cir. 1992); *Mariani-Giron* v. *Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991); *Pope* v. *MCI Telecomms. Corp.*, 937 F.2d 258, 266-267 (5th Cir. 1991), cert. denied, 504 U.S. 916 (1992); *Roberts* v. *College of the Desert*, 870 F.2d 1411, 1418-1419 (9th Cir. 1988); *Jordan* v. *Young*, No. 85-5316, 1986 WL 16907, at **2-3 (6th Cir. Apr. 4, 1986); *Pitney Bowes, Inc.* v. *Mestre*, 701 F.2d 1365, 1374-1375 (11th Cir.), cert. denied, 464 U.S. 893 (1983); *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), cert. denied, 454 U.S. 1125 (1981); *Elfman Motors, Inc.* v. *Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977); *Terkildsen* v. *Waters*, 481 F.2d 201, 206 (2d Cir. 1973). As the court explained in *Kotler*:

> Omitting the preemption order while, at the same time, designating a completely separate and independent order loudly proclaims [an appellant's] intention not to appeal from the former order.

981 F.2d at 11; cf. *C.A. May Marine Supply Co.*, 649 F.2d at 1056 ("Where parts of the judgment are truly independent, there is more likelihood that the designation of a particular part in the notice of appeal will be construed as an intent to leave the unmentioned portions undisturbed.").

That rule extends to the circuits that in other circumstances consider materials outside the notice of appeal to ascertain the appellant's intent for Rule 3 purposes. See pp. 7-9, *supra*. It is one thing to consult external sources to divine an appellant's intent to appeal related orders or issues; it is quite another to rely on such sources to infer an appellant's intent to appeal entirely unrelated orders from a separate case. Accordingly, there appears to be no direct conflict on how to interpret the scope of a notice of appeal where the undesignated order disposes of claims neither factually nor procedurally related to the those in the designated order.

Given the extant rule that a notice of appeal designating one order is not effective as to completely unrelated orders, even an expansive view of what outside sources can be considered would not aid petitioner. The two orders from which petitioner seeks to appeal not only resolved completely different issues—an assault claim and a medical disqualification claim—but they were in fact part of two separate cases filed more than a year apart. Pet. App. 5a-8a. Therefore, this unusual case is not an appropriate vehicle to resolve any differences in approach between the circuits as to what materials beyond the notice of appeal may ordinarily be con-

sidered to determine the scope of the notice under Rule 3(c)(1)(B).[3]

b. Contrary to petitioner's argument (Pet. 29-31), nothing in *Becker* v. *Montgomery*, 532 U.S. 757 (2001), or *Foman* v. *Davis*, 371 U.S. 178 (1962), compels a different result either. In *Becker*, the Court held that a pro se plaintiff's timely but unsigned notice of appeal was functionally equivalent to an effective notice of appeal. 532 U.S. at 761. In *Foman*, this Court held that a premature notice of appeal of a judgment, coupled with a timely notice of appeal from an order denying post-judgment relief, was effective to appeal the former judgment. 371 U.S. at 180-182. Neither *Becker* nor *Foman* addressed the situation here, where petitioner seeks appeal of an undesignated order involving unrelated issues from an unrelated case.

One purpose of Rule 3 is "to ensure that the filing provides sufficient notice to other parties and the courts." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992). That purpose is served when "no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker*, 532 U.S. at 767. According to *Smith*, the time period for determining whether any "genuine doubt exists" is the period for filing a notice of appeal designated by Fed. R. App. P. 4. 502 U.S. at 249. Although the appellants in *Becker*, *Foman*, and *Smith* had technically failed to comply with the requirements

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[3] The fact that the February 11 order granting summary judgment to the Secretary in the retaliatory assault case was also entered in the medical disqualification case does not help petitioner. Petitioner's filing of a notice of appeal in each case that requested an appeal of the "Summary Judgment and Termination entered in this action on the 11th day of February, 2008" could have signaled merely an abundance of caution by petitioner to avoid losing the ability to appeal that order.

of Rule 3, they each nonetheless had manifested—without any doubt and within the time limits prescribed by Rule 4—an intent to appeal from a specific judgment. See *Foman*, 371 U.S. at 182; *Becker* 532 U.S. at 760-761; *Smith*, 502 U.S. at 246.

Unlike in those cases, petitioner's intent to appeal the judgment in the medical disqualification case was not without "genuine doubt" at the end of the period designated by Rule 4 for filing a notice of appeal. Each of petitioner's notices of appeal manifests an unequivocal intent to appeal only from the retaliatory assault order. Petitioner argues (Pet. 34) that his statements of issues, which were filed with the court of appeals within the time limits for noticing an appeal, manifest a different intent. As petitioner asserts, the statement of issues filed in the medical disqualification case raises the medical disqualification issue. But it also designates only the district court's final judgment in the retaliatory assault case (the February 11, 2008 order) as the order to be appealed and fails to designate the district court's final judgment in the medical disqualification case. The statement, even read in conjunction with the notice of appeal, therefore did not contain all of the information—in particular, a designation of the order or judgment from which the appeal is being taken—required by Rule 3(c)(1)(B).[4]

2. In a supplemental brief, petitioner presents a new claim: that "the Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that Rule 3 * * * is jurisdictional, should be overruled." Supp. Pet. 11. In

[4] Petitioner also relies (Pet. 34) on his appellate briefs as demonstrative of his intent to appeal both orders. Those briefs, however, were filed after the time limits for filing a notice of appeal under Rule 4 had expired. Pet. App. 9a-10a.

Torres, the Court held that the requirements of Fed. R. App. P. 3(c) are jurisdictional. 487 U.S. at 320-321. Petitioner characterizes *Torres* as resting "in particular on the interpretation of the Advisory Committee that originally drafted Rules 3 and 4." Supp. Pet. 1. Petitioner contends that in *Union Pacific Railroad* v. *Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment*, 130 S. Ct. 584 (2009), this Court "seriously undermined the specific reasoning" of *Torres* by holding that "the views of those who framed a rule as to whether it is jurisdictional are irrelevant unless Congress has by statute authorized those officials to create a jurisdictional requirement." Supp. Pet. 5. Petitioner argues that, as was the case with the Railway Labor Act at issue in *Union Pacific*, the Rules Enabling Act does authorize rules which limit the subject-matter jurisdiction of the lower courts, and the Federal Rules of Appellate Procedure thus cannot contain such limits.

Petitioner's new claim does not warrant this Court's review. As an initial matter, petitioner's supplemental brief argues an issue not raised in his petition for certiorari. Although Supreme Court Rule 15.8 permits the filing of a supplemental brief while a petition is pending to "call[] attention to new cases," it does not license a petitioner to formulate entirely new questions presented that could have been previously raised in the petition itself. See Eugene Gressman et al., *Supreme Court Practice* § 6.27, at 471 (9th ed. 2007). That is essentially what petitioner has done here—after the period for petitioning for certiorari has expired—arguing for the first time in his supplemental brief that Rule 3 should not be construed as jurisdictional.

On the merits, even assuming that *Union Pacific* stands for the proposition that procedural rules are ju-

risdictional only if Congress intended to confer jurisdictional authority on the rulemaking body, that would not undermine the Court's holding in *Torres*. In describing the distinction between claims processing and jurisdictional rules, the Court in *Union Pacific* itself noted the statutory and hence jurisdictional character of certain aspects of the notice of appeal:

> In contrast, relying on a long line of this Court's decisions left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a).

130 S. Ct. at 597 (citing *Bowles* v. *Russell*, 551 U.S. 205, 209-211 (2007)). Section 2107(a), which imposes the time limits appearing in Rule 4 for filing a notice of appeal, creates a statutory requirement that this Court has repeatedly found to be jurisdictional.

That analysis informs the jurisdictional nature of Rule 3 as well. Contrary to petitioner's characterization, the Court in *Torres* did not base its interpretation of Rule 3 as jurisdictional on the interpretation of the Advisory Committee or even from the content of Rule 3 itself. Instead, the Court explained that the jurisdictional nature of Rule 3 derives from the jurisdictional nature of the time limits in Rule 4:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the

> Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Torres, 487 U.S. at 315. In other words, the *Torres* Court held that the requirements of Rule 3—which establish the contents of a notice of appeal—must be jurisdictional, because a party who has not complied with those requirements has not filed a timely or effective notice of appeal and that failure creates a jurisdictional defect under Rule 4 and 28 U.S.C. 2107(a). The Court in *Torres* went on to explain why it found "support for [its] view in the Advisory Committee Note following Rule 3," 487 U.S. at 315, but did not base its holding on that ground.

In any event, as petitioner acknowledges (Supp. Pet. 2), every court of appeals has held that Rule 3 is jurisdictional in nature. There is thus no conflict warranting further review.

3. Petitioner contends (Pet. 35-37) that the court of appeals' decision on his retaliatory assault claim conflicts with *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997), and *Burlington Northern & Santa Fe Railway* v. *White*, 548 U.S. 53 (2006). Further review of this issue is not warranted.

The court of appeals' decision does not conflict with either *Robinson* or *White*. In *Robinson*, this Court held that Title VII's definition of employees includes former as well as current employees. 519 U.S. at 346. In *White*, this Court held that the private-sector retaliation provision of Title VII "extends beyond work-place-related or employment-related retaliatory acts and harm" and includes any conduct that would dissuade "a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 67-68 (quoting *Rochon* v. *Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). But the

court of appeals did not affirm the grant of summary judgment for the Secretary simply because petitioner was a former rather than a current employee (*Robinson*) or simply because the alleged retaliation occurred outside the workplace (*White*). Rather, it held that petitioner's "proper remedy [lay] against Blumberg under tort law," Pet. App. 22a, because, under settled agency principles, the acts complained of could not be attributed to petitioner's former employer, *id.* at 21a-22a.

Based "on the general common law of agency," an employer is generally responsible under Title VII for the conduct of an employee if the conduct violating Title VII occurred within the employee's scope of employment. *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-755 (1998) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989)) ("Congress has directed federal courts to interpret Title VII based on agency principles."). "[I]t is accepted that 'it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited.'" *Id.* at 756 (quoting Floyd R. Mechem, *Outlines of the Law of Agency* § 394, at 266 (4th ed. 1952)). An intentional tort may be within the scope of employment when it is "actuated, at least in part, by a purpose to serve the [employer]," *e.g.*, a salesperson who lies to complete a sale. *Ibid.* (brackets in original) (quoting Restatement (Second) of Agency § 228(1)(c) (1958)). As a counter-example, the Court noted that sexual harassment is beyond the scope of employment. *Id.* at 757.

Under common law agency principles, if the conduct occurs outside the scope of employment, the employer is liable in only four circumstances: (a) if the employer intended the conduct or the consequences; (b) if the em-

ployer was negligent or reckless in allowing the conduct to occur; (c) if the conduct violated a non-delegable duty of the employer; or (d) if the employee purported to act or to speak on behalf of the principal and relied upon apparent authority, or was aided in accomplishing the tort by the existence of the agency relation. *Ellerth*, 524 U.S. at 758.

Applied "to the peculiar facts of this case" (Pet. App. 21a-22a), these basic agency principles—adopted by this Court in *Ellerth* and other cases in the Title VII context—demonstrate the correctness of the court of appeals' holding that the Secretary could not be held vicariously liable for Blumberg's alleged assault on petitioner. Blumberg's alleged conduct falls far beyond the scope of his employment. According to petitioner's account, Blumberg's motivation in driving his truck at petitioner appears to have been his own personal anger at being served with a subpoena. *Id.* at 3a (describing Blumberg's "face and body language" as reflecting "rage" when he was served); *id.* at 4a (describing Blumberg's alleged verbal assault). Moreover, an assault with an automobile cannot in this context be considered to serve the purposes of a governmental employer—in contrast to, for example, a lie by an employee to complete a sale.

Blumberg's alleged conduct also would not fall within any of the four circumstances where an employer can be liable for conduct that goes beyond the scope of employment. Petitioner does not argue that the Secretary or anyone else at the FAA intended that Blumberg assault petitioner or were negligent in allowing such an assault—a spontaneous act beyond the control of any of Blumberg's supervisors. Pet. App. 2a-4a. Nor has petitioner alleged that the Secretary or anyone else at the

FAA either condoned or ratified Blumberg's actions, and no non-delegable duty of the Secretary or the FAA is at issue here. Further, there is no evidence that Blumberg acted on behalf of the Secretary or the FAA, and Blumberg was in no way aided by the agency relationship in the alleged commission of the tort. And Blumberg's former status as a supervisor had no relation to his ability to assault petitioner. *Ibid.*

In any event, petitioner does not allege that the court of appeals' decision conflicts with any decision of another court of appeals on this issue, and the factbound application of well established agency principles in this Title VII case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
BENJAMIN S. KINGSLEY
Attorneys

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No. 09-440

In The Supreme Court of the United States

WILLIAM H. SCHRAMM,

Petitioner,

v.

RAY LAHOOD,
Secretary, Department of Transportation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Petitioner submits this supplemental brief regarding the Court's decision of December 8, 2009 in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 130 S.Ct. 584 (2009). In light of that decision, we urge that the time has come to overrule the holding of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that the requirements of Rule 3 of the Federal Rules of Appellate Procedure are jurisdictional.

(1) Twenty-one years ago this Court held that Rule 3(c) of the Federal Rules of Appellate Procedure is a "jurisdictional prerequisite." *Torres v. Oakland Scavenger Co.*, 487 U.S. at 318; see *id.* at 314 ("Rule ... 3(c) presents a jurisdictional bar"), 317 ("the jurisdictional requirements of Rules 3 and 4."). That holding rested in particular on the interpretation of the Advisory Committee that originally drafted Rules 3 and 4.

> The [Note of] the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a single jurisdictional threshold.... Our conclusion that the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature, although not determinative, is "of weight" in our construction of the rules.

Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444 (1946).

487 U.S. at 315-16.[1]

In the wake of the controlling decision in *Torres*, all twelve geographic courts of appeals have held that Rule 3 is jurisdictional.[2] In the instant case the court below, citing the decision in *Torres* and relying on well established Sixth Circuit precedent,[3] treated Rule 3(c)(1)(B) as jurisdictional. (App. 11a).[4] The Sixth Circuit's view that Rule 3(c)(1)(B) is jurisdictional

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[1] *Torres* concerned the application of Rule 3(c)(1)(A), governing the designation of the party taking an appeal. The interpretation of Rule 3(c)(1)(A) in *Torres* was superseded by the 1993 amendment to Rule 3(c)(1)(A).

[2] *Constructa Andrade-Gutierrez, S.A. v. American Intern. Ins. Co. of Puerto Rico*, 467 F.3d 38, 44 (1st Cir. 2008); *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 452 (2d Cir. 2008); *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 236 (3d Cir. 2005); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 806 n.8 (5th Cir. 2004); *U.S. v. Paul*, 551 F.3d 516, 531 (6th Cir. 2009); *In re Turner*, 574 F.3d 349, 352 (7th Cir. 2009); *Chambers v. City of Fordyce, Arkansas*, 508 F.3d 878, 880 (8th Cir. 2007); *Dawson v. City of Seattle*, 435 F.3d 1054, 1070 (9th Cir. 2006); *U.S. v. Alisal Water Corp.*, 431 F.3d 643, 660 (9th Cir. 2005); *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002); *U.S. v. Dando*, 287 F.3d 1007, 1010 (10th Cir. 2002); *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158, 161 (11th Cir. 1988); *Hudson v. District of Columbia*, 588 F.3d 526, 529 (D.C. Cir. 2009).

[3] Prior to the decision in the instant case there were more than two dozen Sixth Circuit decisions holding Rule 3 jurisdictional.

[4] "Rule 3 imposes jurisdictional requirements that may not be waived, even for good cause shown."

was critical to its disposition of the medical disqualification claim in this case. Whether the notice of appeal in this case complied with Rule 3(c)(1)(B) was first raised by the court itself, as it was required to do regarding any jurisdictional requirement, even though the appellee had not objected to the sufficiency of the notice of appeal. (App. 9a).[5] If the requirements of Rule 3(c)(1)(B) are not jurisdictional, the appellee clearly had waived any such objection. The Sixth Circuit held it "lack[ed] jurisdiction over the district court's order." (App. 16a).[6]

Since *Torres* was decided, however, this Court has repeatedly cautioned that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term [jurisdictional]." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); see *Eberhart v. United States*, 546 U.S. 12, 18 (2005) (per curiam); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004). In *Kontrick* this Court emphasized that the term "jurisdictional" should be used

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[5] "Although the Secretary did not bring Schramm's omission to our attention, we have a duty to consider sua sponte whether appellate jurisdiction is properly invoked.... Accordingly, at oral argument we raised the issue whether there is a jurisdictional defect in the notice of appeal."

[6] See App. 23a ("the appeal filed in the medical disqualification case ... is dismissed for lack of jurisdiction") (capitalization omitted).

> not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

540 U.S. at 455. *Arbaugh* held that a statutory requirement should be deemed only a claim-processing rule or an element of a claim unless "the Legislature clearly states that a ... limitation ... shall count as jurisdictional." 546 U.S. at 515.

Despite this recent insistence on a more limited use of the term "jurisdictional," this Court has not revisited the original holding in *Torres* that Rule 3 is jurisdictional. Only seven months ago the Court reiterated, albeit in a footnote, the holding in *Torres*.

> We recognize that construing Rule 3(c) [of the Federal Rules of Appellate Procedure] as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not the judicial process."

United States ex rel. Eisentein v. City of New York, 129 S.Ct. 2230, 2236 n.4 (June 8, 2009) (quoting *Torres*, 487 U.S. at 318 (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986))).[7]

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[7] In *Becker v. Montgomery*, 532 U.S. 757, 765 (2001), this Court reiterated that "[a]ppellate Rules 3 and 4 ... are indeed linked jurisdictional provisions."

Since the filing of the petition in the instant case, however, this Court's decision in *Union Pacific* has seriously undermined the specific reasoning which led the Court in *Torres* to conclude that Rule 3 is jurisdictional. *Union Pacific* concerned a rule of the National Railroad Adjustment Board which precluded consideration of a case absent proof that conferencing had occurred. 130 S.Ct. at 597-98. The Carrier in *Union Pacific* contended that the Board which had adopted the rule in question itself regarded that requirement as jurisdictional, an argument similar to the reasoning in *Torres*, which had relied on the views of the Advisory Committee in holding that Rule 3 is jurisdictional.

Union Pacific, however, held that the views of those who framed a rule as to whether it is jurisdictional are irrelevant unless Congress has by statute authorized those officials to create a jurisdictional requirement.

> The Carrier cites NRAB decisions that allegedly support characterization of conferencing as jurisdictional. If the NRAB lacks authority to define the jurisdiction of its panels, however, surely the panels themselves lack that authority.

130 S.Ct. at 598. The statute authorizing the NRAB to issue rules stated only, in general terms, that the Board could "adopt such rules as it deems necessary to control proceedings." 45 U.S.C. § 153 First (v); see *Union Pacific*, 130 S.Ct. at 597-98. The Court concluded that this language did not empower the Board

to issue a jurisdiction-restricting rule. 130 S. Ct. at 590 ("Congress authorized the Board to prescribe rules for the presentation and processing of claims, ... but Congress alone controls the Board's jurisdiction"), 597 ("Congress gave the Board no authority to adopt rules of jurisdictional dimension."). Because the statutory authority of the NRAB to adopt rules did not include the power to issue rules limiting the jurisdiction of the Board or its panels, *Union Pacific* concluded that the rule in that case was not jurisdictional. 130 S.Ct. at 597-98.

(2) *Union Pacific* held that the Railway Labor Act's generally phrased statutory authorization for the adoption of rules did not permit the issuance of a rule that limits the jurisdiction of the National Railroad Adjustment Board. *Union Pacific* is apparently the first decision of this Court determining whether a particular statute authorizing the adoption of a procedural rule empowered the court or agency to promulgate a jurisdiction-limiting provision. The holding of *Union Pacific* rests on principles equally applicable to the Rules Enabling Act under which Rule 3 was adopted.

Under the terms of the Railway Labor Act, the jurisdiction of National Railroad Adjustment Board

> extends to "all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application or agreements concerning rates of pay, rules, or working conditions....'" *Slocum v. Delaware,*

L. & W.R. Co., 339 U.S. 239, 240 (1950) (quoting § 153 First (i)).

130 S.Ct. at 597. Although the Railway Labor Act requires conferencing, the statutory conferencing requirement is set out in a provision separate from the grant of jurisdiction, and the conferencing requirement does not "'speak[] in jurisdictional terms or refer[] in any way to the jurisdiction of the' NRAB." 130 S.Ct. at 597 n.8 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Thus under the Railway Labor Act itself, the Board would have jurisdiction over a grievance even where that grievance had not first gone through conferencing. 130 S.Ct. at 394.

A rule adopted by the Board could not modify or override any portion of the Railway Labor Act – including the Act's grant of jurisdiction to the Board – unless the provision authorizing adoption of rules expressly stated that such a rule could supersede the terms of the Act itself. Section 153 First (v), which authorizes the Board to adopt rules, contains no such express power to modify the terms of the jurisdictional grant in the Railway Labor Act. Section 153 First (v) thus did not empower the Board "by rule, to extend or restrict the jurisdiction conferred by ... statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941).

When the Railway Labor Act was adopted, several decisions of this Court had indicated that a court-adopted rule could not restrict the jurisdiction

of that or any other court.[8] "[T]his Court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States ... under the constitution and laws of the United States." *Hudson v. Parker*, 156 U.S. 277, 284 (1895); see *Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 35 (1908) ("The jurisdiction of the circuit court is prescribed by laws enacted by Congress in pursuance of the Constitution, and this court by its rules has no power to increase or diminish the jurisdiction thus created"). In the absence of any express statutory indication to the contrary, it is reasonable to assume that in adopting the Railway Labor Act (or any other statute) Congress did not intend to

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[8] In *Kontrick* the government took the position that *only* a statute, and not a rule, could limit (or extend) the jurisdiction of a court.

> The jurisdiction of the lower federal courts is created by statute, not by rules of practice. As this Court has emphasized, "[i]t is axiomatic" that the rules of practice and procedure established by this Court for the lower federal courts can neither create nor destroy the jurisdiction that Congress has created. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978).... In order for a time limit for filing a claim to constitute a true "jurisdictional prerequisite to suit in federal court" (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. [385,] 393 [(1982)]), it would need to be established by Congress, not in a rule of practice or procedure adopted by this Court.

Brief of the United States as Amicus Curiae Supporting Respondent, at 10-11 (footnote omitted), available at 2003 WL 21688237.

authorize the promulgation of the type of jurisdiction-restricting rule which this Court had repeatedly indicated would be impermissible.

Arbaugh v. Y & H Corp. held that a statute establishing a procedural or substantive requirement should not be construed as jurisdictional in nature unless the text of the law "clearly states" that a jurisdictional restriction was being created. 546 U.S. at 516. A similar rule of construction is appropriate for determining whether a statute authorizes the adoption of rules that restrict or expand jurisdiction. A jurisdiction-limiting rule, like a statute construed to impose a jurisdictional requirement, is disfavored because it would pose a significant risk of "unfair[ness]" and "waste of judicial resources." *Arbaugh*, 546 U.S. at 515. If (as under *Arbaugh*) statutes authorizing the adoption of rules are presumed not to authorize jurisdiction-limiting rules unless such authority is "clearly state[d]," "courts and litigants will ... not be left to wrestle with the issue." 546 U.S. at 515-16. The provision of the Railway Labor Act that authorizes the Board to adopt rules, like the statute at issue in *Arbaugh*, "does not speak in jurisdictional terms." 546 U.S. at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

(3) The original decision in *Torres* never considered the threshold issue now deemed critical under *Union Pacific*, whether the Rules Enabling Act authorized the Advisory Committee to frame, and this Court to adopt, a rule which limits the subject matter jurisdiction of the lower courts. In light of the standard

established by *Union Pacific*, it is clear that the Rules Enabling Act does not empower this Court to promulgate such a rule.

The Rules Enabling Act provides that this Court "shall have the power to prescribe general rules of practice and procedure ... for cases in the United States ... courts of appeals." 28 U.S.C. § 2072(a). That general language is similar to the wording of the rule-authorizing provision of the Railway Labor Act which *Union Pacific* held did not empower the NRAB to issue a jurisdiction-restricting rule. The Rules Enabling Act, like section 153 First (v) of the Railway Labor Act, does not "speak in jurisdictional terms," and thus is insufficient to authorize this Court to adopt rules which limit the jurisdiction of the courts of appeals or district courts. Section 2072(a) authorizes only the adoption of non-jurisdictional claim-processing rules.

Although *Union Pacific* has largely eviscerated the rationale of *Torres*, the conflict between those decisions of this Court is not one which the lower courts have the power to resolve. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S.

477, 484 (1989).[9] Because *Torres* squarely holds that Rule 3 is jurisdictional, the lower courts could not revisit the correctness of *Torres* even if this Court were to vacate and remand the instant case for reconsideration in light of *Union Pacific*. On such a remand the courts below would still be obligated to continue to apply *Torres*. Similarly, because all lower courts remain bound by *Torres*, it is unlikely that a conflict will arise among the courts of appeals as to whether Rule 3 is jurisdictional.[10]

In light of the decision in *Union Pacific*, the time has come to reconsider the holding in *Torres* that Rule 3 is jurisdictional. In granting certiorari, the Court should direct the parties to brief and argue the following question: "Whether the Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that Rule 3 of the Federal Rules of Appellate Procedure is jurisdictional, should be overruled?" See *Pearson v. Callahan*, 128 S.Ct. 1702 (2008).

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[9] This is a situation like *Eberhart v. United States*, in which the lower courts will likely and correctly conclude that they remain bound by *Torres*. In *Eberhart* the court of appeals regarded itself as bound by this Court's earlier decisions, "even though it expressed grave doubts in light of *Kontrick*." 546 U.S. at 18. This Court held that the court of appeals in *Eberhart* had taken the "prudent course" by not undertaking on its own to "upset[ ] what the Court of Appeals took to be our settled precedents." *Id.*

[10] Since this Court's 2004 decision in *Kontrick*, almost every circuit has reiterated its adherence to the holding of *Torres* that Rule 3 is jurisdictional. See n.2, *supra*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

No. 09-440

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In The
Supreme Court of the United States

WILLIAM H. SCHRAMM,

Petitioner,

v.

RAY LAHOOD,
Secretary, Department of Transportation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709
joeschramm@verizon.net

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED

(1) The government correctly observes that under Rule 3(c)(1)(B) the scope of the issues encompassed by a notice of appeal turns on "the intent of the appellant." (Br. Opp. 7). It acknowledges that "the circuits differ in the materials they consider in determining that intent." (*Id.*).

The brief in opposition highlights the underlying inter-circuit conflict. In the instant case the Sixth Circuit, in determining whether petitioner had appealed the medical disqualification order, expressly refused to consider petitioner's brief on appeal as an indication of petitioner's intent to appeal that order. "It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs." (Pet. App. 15a). The government emphatically defends that refusal, insisting that appellate briefs cannot be considered in determining the scope of an intended appeal because appellate briefs are "filed after the time limits for filing a notice of appeal under Rule 4." (Br. Opp. 13 n.4).

Six circuits have taken precisely the opposite position, expressly relying on appellate briefs to determine the intended scope of an appeal. *KH Outdoor, LLC v. Trussville*, 465 F.3d 1256, 1259 (11th Cir.2006) ("it is overwhelmingly clear that the city intended to appeal from the district court's ruling that KH Outdoor is entitled to damages. The appellant's brief

addresses only that issue") (emphasis omitted); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir.2005) ("Bogart's intent to appeal from the ... Order can be readily inferred from the discussion in her opening brief"); *Chamorro v. Puerto Rican Cars, Inc.*, 304 F.3d 1, 3 (1st Cir.2002) ("The fact that Batiz, in his appellate briefs, presents exactly the same arguments as to [both orders] ... provides further justification for ascribing to him an intent to seek review of both orders"); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1171 (9th Cir.1995) ("we may infer from ... the arguments contained in Simpson's brief, that Simpson intended to appeal ... the order"); *Montes v. United States*, 37 F.3d 1347, 1351 (9th Cir.1994) ("from his briefs, it is clear that Montes intended to appeal from the court's First Judgment"); *United States v. Rodriguez*, 932 F.2d 374, 375 (5th Cir.1991) ("when the intent to appeal an unnamed ... ruling is apparent ... from the briefs ... and no prejudice results to the adverse party, the appeal is not jurisdictionally defective"); *Wright v. American Home Ins. Co.*, 488 F.2d 361, 363 (10th Cir.1974) ("[a]ppellant's intention to seek review of the judgment is manifest.... [A]ppellant briefed the merits").

The posture of these decisions in the First, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits was essentially the same as in the instant case. In those cases, as here, the appellant sought to rely on the contents of the appellate briefs as indicative of the intent of the earlier notice of appeal. Had Schramm's appeal been heard in any of those circuits,

his appellate brief – which the Sixth Circuit acknowledged made "obvious" his intent to appeal the dismissal of the medical disqualification claim – would have been dispositive.

(2) Respondent contends that this case does not present an appropriate vehicle for resolving this inter-circuit conflict because the courts of appeals have adopted a special per se rule governing cases in which the order not expressly mentioned in a notice of appeal is "wholly unrelated to" the order listed in that notice. (Br. Opp. 7, 11). Respondent asserts that this per se rule "does not permit appellate review of orders disposing of completely unrelated claims." (Br. Opp. 10). Under this asserted rule, if an appellate court determines that the two orders (one expressly designated, one not) are "wholly unrelated," the intent of the appellant is of no importance. The government contends that this case is not an appropriate vehicle for deciding what materials may be relied on to determine intent because the two orders in the instant case were "completely unrelated" and thus are controlled by the per se rule. (Br. Opp. 10-12).

There is no such rule. Respondent cites nine appellate decisions that assertedly "held that Rule 3(c)(1)(B) does not permit appellate review of orders disposing of completely unrelated claims or cases." (Br. Opp. 10). None of those cases contain any such holding. None of the cases identified by the government purports to establish any special rule for "wholly unrelated" orders or issues; not one of those decisions

uses the phrases "completely unrelated" or "wholly unrelated."

Far from declaring any such per se rule rendering irrelevant the intent of the appellant, the decisions cited by the government actually turned on a determination of just that intent. In *Kotler v. American Tobacco Co.*, 981 F.2d 7 (1st Cir.1992), for example, the First Circuit explained that the controlling issue was whether "plaintiff sufficiently manifested an intention to appeal" the order in dispute. 981 F.2d at 11. *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir.1977), held that

> if from the notice of appeal itself and the subsequent proceedings on appeal it appears that the appeal was intended to have been taken from an unspecified judgment order or part thereof, the notice may be construed as bringing up the unspecified order for review.

567 F.2d at 1254. In *Mariani-Giron v. Acevedo-Ruiz*, 945 F.2d 1 (1st Cir.1991) (opinion joined by Breyer, J.), the court agreed that a notice of appeal could encompass an order not specifically designated "where the appellant's intent to appeal [the other order] is clear." 945 F.2d at 3. *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049 (5th Cir.1981), held that

> [t]he party who makes a simple mistake in designating the judgment appealed from does

> not forfeit his right of appeal where the intent to pursue it is clear.

649 F.2d at 1056.

The decisions cited by respondent do not involve some special category of "completely unrelated" claims or orders. Rather, in all of those cases the orders (one expressly designated and one not) were interrelated in some way. The claims in *Kotler*, for example, all arose out of a single event, the death of the plaintiff's husband due to smoking-induced lung cancer, and were obviously related. See *Kotler v. American Tobacco Co.*, 981 F.2d 7 (1st Cir.1992). In *Mariani-Giron* the two orders at issue were the dismissal of the plaintiff's claim and the denial of the plaintiff's Rule 59(e) motion to set aside that very dismissal. 945 F.2d at 2-3. The relationship between the two orders is at most one of several factors to be considered in determining the "likelihood [that there was] an intent to leave the unmentioned [order] undisturbed." *C.A. May Marine Supply Co.*, 649 F.2d at 1056.

(3) The government contends that this Court itself has adopted a per se rule applicable to the instant case. That rule, respondent asserts, is that in determining the intent of an appellant in filing a notice of appeal, a court may consider only materials made part of the record during "the period for filing a notice of appeal designated by Fed. R. App. P. 4." (Br. Opp. 12). Under that asserted standard, respondent urges, a court could not consider the contents of an appellate brief, because such a brief would be "filed

after the time limits for filing a notice of appeal under Rule 4 had expired." (Br. Opp. 13 n.4). That per se rule, the United States contends, was applied by this Court in *Foman v. Davis*, 371 U.S. 178 (1962).

The decision in *Foman*, however, is precisely to the contrary. *Foman* expressly relied on the very appellate filings which respondent insists may not be considered.

> Taking the two notices [of appeal] and the appeal papers together, petitioner's intention to seek review of both [district court orders] was manifest. Not only did both parties brief and argue the merits of the earlier [order] on appeal, but petitioner's statement of points on which she intended to rely on appeal ... submitted to ... the court ... similarly demonstrated the intent to challenge the [order in question].

371 U.S. at 181.

Smith v. Barry, 502 U.S. 244 (1992), does not modify the holding in *Foman* that appeals papers, although filed outside the Rule 4 filing period, may be considered in determining the scope of a notice of appeal. The issue in *Smith* was not which orders were being appealed, but whether the appellant had appealed at all during the 30 day period under Rule 4 and section 2107(a). *Smith* held that the appellant in that case had met that deadline, even though he had not filed a notice of appeal in the district court, because during the 30 day period he had submitted an informal brief to the court of appeals. 502 U.S. at

248-49. Nothing in *Smith* indicates that in determining what order an appellant sought to appeal (rather than in determining whether an individual intended to appeal at all) a court may look only at materials filed within thirty days after the order in question. 502 U.S. at 248.

II. THIS COURT SHOULD RECONSIDER THE HOLDING IN *TORRES* THAT RULE 3 IS JURISDICTIONAL

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), held that the requirements of Rule 3 of the Federal Rules of Appellate Procedure are jurisdictional. *Torres* is inconsistent with a series of subsequent decisions of this Court, most recently *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010), that carefully distinguish between jurisdictional conditions and claim-processing rules.

Torres represents the sort of "drive-by jurisdictional rulings" against which this Court has repeatedly cautioned. *Elsevier*, 130 S.Ct. at ___. The circumstances of *Torres* only required this Court to decide if Rule 3(c)(1)(A) – which mandates that a notice of appeal designate the party appealing – is jurisdictional. The opinion in *Torres*, however, was phrased more broadly, holding variously that all of Rule 3(c) and even Rule 3 as a whole were jurisdictional. 487 U.S. 315-18 and n.3. In light of this Court's post-*Torres* decisions, the provisions of Rule 3 other than Rule 3(c)(1)(A) would properly be categorized as claims-processing rules rather than jurisdictional requirements.

Elsevier, 130 S.Ct. at ___; see Rules 3(a)(1) (requiring filing of multiple copies of notice), 3(c)(1)(B) (requiring designation of order appealed from), 3(c)(1)(C) (requiring naming of the court to which appeal is taken), 3(e) (requiring payment of all required fees).

The jurisdictional requirement of section 2107(a) itself is satisfied so long as "notice of appeal is filed" within the requisite time period. If that timeliness requirement is met, section 1291 provides that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts." Neither *Torres* nor respondent suggests that section 2107(a) itself requires that a notice of appeal have any particular content or take any particular form, so long as that notice manifests an intent to appeal at all. If Rule 3(c)(1)(B) did not exist, the notice of appeal that was filed in the medical disqualification case would have been sufficient to confer on the court of appeals jurisdiction over the final decision in that proceeding.

If in the instant case the court of appeals nonetheless lacked jurisdiction over the medical disqualification appeal, that would have to be because the jurisdictional grant in sections 1291 (subject to section 2107(a)) was restricted by the promulgation of Rule 3. But the United States does not contend that the Rules Enabling Act authorizes the promulgation of rules that limit (or expand) the jurisdiction of the federal courts. Nor does the government disavow the position it took in *Kontrick v. Ryan*, 540 U.S. 443 (2004), that a rule *could not* modify the jurisdiction of a federal court. (Supp. Br. 8 n.8).

Respondent points out that *Union Pacific Railroad v. Brotherhood of Locomotive Engineers*, 130 S.Ct. 584 (2009), "noted the statutory and hence jurisdictional character of certain aspects of the notice of appeal." (Br. Opp. 15). But the only "aspect[ ] of the notice of appeal" which *Union Pacific* characterized as jurisdictional was the requirement in 28 U.S.C. § 2107(a) as to *when* a notice of appeal is to be filed. The government does not contend, and neither *Union Pacific* nor *Torres* hold, that section 2107(a) itself imposes any of the requirements of Rule 3.

The government appears to suggest that section 2107(a) requires that any notice of appeal must satisfy the requirements of the Federal Rules of Appellate Procedure.

> [T]he requirements of Rule 3 – which establish the contents of a notice of appeal – must be jurisdictional, because a party who has not complied with those requirements has not filed a[n] ... effective notice of appeal and that failure creates a jurisdictional defect under ... 28 U.S.C. 2107(a).

(Br. Opp. 16). But section 2107(a) does not require the filing of an "effective notice of appeal"; it makes mandatory only the filing of a document which indicates that a party is appealing. That is why in *Smith v. Barry* held that the submission of an appellate brief was sufficient to meet the statutory deadline.

The government insists that the reasoning in *Torres* is unlike the argument rejected in *Union Pacific*

because "*Torres* did not base its interpretation of Rule 3 as jurisdictional on the interpretation of the Advisory Committee." (Br. Opp. 15). To the contrary, *Torres* referred to the Advisory Committee in six different passages, quoted the Committee Note regarding Rule 3, discussed several cases referred to in that Note, and explained that "the Advisory Committee view[ ] ... is 'of weight' in our construction of the Rule." 487 U.S. at 316 (quoting *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444 (1946)).

The holding in *Torres* that Rule 3 is jurisdictional is in some tension with the manner in which this Court construes its own Rules. Section 2101(c) of 28 U.S.C. provides that a petition for a writ of certiorari must in most instances be filed within ninety days of the judgment to be reviewed; Rule 14 of the Rules of this Court specifies the contents of such a petition. Rule 14(1)(a), the provision most analogous to Federal Rule of Appellate Procedure 3(c)(1)(B), requires a petition to include a statement of "[t]he questions presented for review." This Court has not, however, regarded Rule 14(1)(a) as limiting the jurisdiction of this Court; to the contrary, the Court has repeatedly exercised the authority – well after the expiration of the ninety day period – to frame and grant review of additional questions that were not set out in the petition itself.

We agree with the government that there is no conflict among the courts of appeals as to whether Rule 3 is jurisdictional. Because *Torres* is binding on the lower courts, such a conflict cannot arise. Thus no

petition seeking reconsideration of *Torres* could ever meet the standard in Supreme Court Rule 10(a). If *Torres* is to be reconsidered, that would appropriately be at the direction of the Court, as occurred in *Pearson v. Callahan*, 128 S.Ct. 1702 (2008).

III. THE RETALIATORY ASSAULT CLAIM SHOULD BE VACATED AND REMANDED IN LIGHT OF THE POSITION OF THE SOLICITOR GENERAL ASSERTED IN THE BRIEF IN OPPOSITION

In the Sixth Circuit the United States contended that the alleged assault was necessarily outside the scope of employment of the assaulting official because intentional torts are never within the scope of employment.

> Under traditional agency principles, an employee who commits an assault has always been considered to be clearly outside the scope of employment.... Schramm has offered no reason ... why this Court should impose vicarious lability in the case at bar contrary to well-established agency law.

(Brief of Appellee, at 32).

In this Court, the Solicitor General takes a decidedly different position, now agreeing that a retaliatory assault would be within the scope of employment of the employee at issue if that assault were motivated by an intent to advance the interests of the employer.

> An intentional tort may be within the scope of employment when it is "actuated, at least

> in part, by a purpose to serve the [employer]," ... [Floyd R. Mechem, *Outlines of the Law of Agency* § 394, at 266 (4th ed. 1952)] (bracket in original) (quoting Restatement (Second) of Agency § 228(1)(c) (1958)).

(Br. Opp. 17). We agree with the new characterization of agency law set out in the Brief in Opposition.

The Sixth Circuit did not apply the standard now endorsed by the Solicitor General. Respondent urges this Court itself to do so, and asks this Court to determine that the official who assaulted plaintiff in fact acted solely because of "his own personal anger," and not out of any intent to "serve the purposes of a governmental employer." (Br. Opp. at 18). But where, in response to a certiorari petition, the Solicitor General advances a view of the law different from the government's position in the prior phases of the litigation, the practice of this Court is to vacate the judgment and remand the case to the court of appeals for further consideration in light of the position of the Solicitor General. That would be the appropriate course in the instant case.[1]

---

[1] A misguided employee might hope that an assault – in this case coupled with a threat of further retaliation – would frighten a plaintiff into abandoning his lawsuit against the government. Blumberg's statement to plaintiff at the time of the assault that "*they* were not through with him" (App. 26a) (emphasis added) is certainly evidence that Blumberg thought he was acting on behalf of the agency, rather than just venting personal annoyance at having to respond to a subpoena.

(Continued on following page)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

S. JOSEPH SCHRAMM
Counsel of Record
1129 Charles Street
McKees Rocks, PA 15136
(412) 331-6709

BEVERLY WOODALL
254 Hays Road
Pittsburgh, PA 15241
(724) 260-0525

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner

Whether there is sufficient evidence that Blumberg in fact acted at least in part for the purpose of advancing the interest of the government is a question which the lower courts should resolve on remand.